Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

No. 69.

JACOB WIRTH, PLAINTIFF IN ERROR,

vs.

CALVIN BRANSON AND NATHAN LINDSEY, DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HORATIO C. BURCHARD,
For Plaintiff in Error.

Judd & Detweiler, Prs.

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BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR BY HORATIO C. BURCHARD.

I.

STATEMENT OF THE CASE.

1. *History of Proceedings and Pleadings.*

Jacob Wirth, plaintiff in error, brought suit in ejectment in the circuit court of the United States for the southern district of Illinois against Calvin Branson and Nathan Lindsey, the defendants in error, for the possession of the northeast quarter of section eighteen, township four, range two, east of the fourth principal meridian, in the county of Fulton, and State of Illinois, claiming title in fee, to which the defendants in error plead the general issue, and specially denied the possession of Calvin Branson to thirty acres of

the west side and of Nathan Lindsey to one hundred and thirty acres of the east side of said tract. (Record, folios 1 to 4.)

The case was tried at the June term, A. D. 1871, of the circuit court, judgment rendered in favor of plaintiff, and brought by defendants on writ of error to this Court, which, upon hearing, remanded the cause to the circuit court, and ordered a new trial; and the case was again tried at the June term, A. D. 1875, in the circuit court by a jury, which returned a verdict, and judgment was rendered thereon by the court in favor of defendants in error against the exceptions of plaintiff in error, who thereupon prosecuted his writ of error to this Court. (Record, folios 18 to 36.)

The plaintiff in error claims title to the tract in controversy under a patent issued by the United States in February, A. D. 1868, to Edward F. Leonard, and a deed from the latter to him, executed in April, A. D. 1869.

The defendants in error claim title in themselves under a tax deed executed to Timothy Gridley, November 14, 1843, and subsequent mesne conveyances from Gridley and grantees, to themselves, and also claim that the title to said land was in one Thomas Hart, under a deed to the latter from Giles Egerton, to whom defendants in error claim a patent for the land had been issued in January, A. D. 1818.

2. *The Evidence in the Case.*

PLAINTIFF'S TITLE.

Plaintiff in error produced and read in evidence to the jury a patent in regular form issued by the United States to Edward F. Leonard, bearing date February 20, 1868, granting to Leonard and his heirs the lands in controversy, and a deed executed by Leonard April 24th, A. D. 1869, conveying the land to plaintiff in error. (Record, folio 25.)

DEFENDANTS' TITLE.

Title in Egerton or Hart.

The defendants in error then produced in evidence an exemplified copy of the record in the General Land Office at Washington of a military bounty land warrant issued to Giles Egerton, late a sergeant in the company commanded by Captain Salmon C. Cotton, of the twenty-sixth regiment of United States infantry, and of the record of the location of the land warrant on the 10th day of January, A. D. 1818, on the northeast quarter of section eighteen, the land in question. (Record, folios 25, 26.)

The defendants in error also produced in evidence an exemplified copy of the record in the General Land Office of a patent from the United States to Giles Edgerton, dated January 10, A. D. 1818, reciting the deposit by Giles Egerton of a warrant in his favor, and purporting to grant to said "Giles Egerton, late a sergeant in Cotton's company of the 26th regiment of infantry, the northeast quarter of section 18, (the land described in the declaration,) on the margin of which exemplified copy, (and as a part of which exemplification) appeared the following memorandum, (endorsed,) "this patent was issued for the S. E. ¼ instead of the N. E. ¼ as recorded; sent a certificate of that fact to E. B. Clemson, at Lebanon, Ills.: see his letter of 19th May, 1826," which memorandum the court refused to allow to be read to the jury. (Record, folios 27 and 28.)

The defendants produced in evidence a deed from Giles Egerton to Thomas Hart, bearing date July 29, 1819, granting the southeast qr. of section 18, township 4, range 2 east, &c., reciting "which qr. section was granted to the said Giles in consideration of his military services, as will appear by a patent obtained from the General Government dated 10th day of January, A. D. 1818." (Record, folio 28.)

And defendants further produced in evidence an exempli-

fied copy of a record of a patent of the southeast quarter of said section 18, issued by the United States to James Durney, January 7, 1818. (Record, folio 29.)

Tax Title.

Defendants in support of their tax title produced a deed of the land in controversy from the sheriff of Fulton county to Timothy Gridley, dated November 14, A. D. 1843, upon a sale for taxes for the year 1839, upon a judgment at the June term, A. D. 1840, of the circuit court of Fulton county, Illinois, and also produced mesne conveyances from Gridley to themselves, and showed possession and payment of taxes from the year 1843 to the year 1868. (Record, folios 29 and 30.)

Plaintiff's Evidence in Rebuttal.

Plaintiff in error produced deeds conveying the southeast quarter from Thomas Hart to Samuel F. Hunt, from Hunt to Eli B. Clemson, from Clemson to John Shaw, an act of Congress authorizing the legal representatives or assignees of Giles Egerton, late a sergeant in Cotton's company of the 26th regiment of infantry, to enter any unappropriated quarter section of land in the tract reserved for the satisfaction of military bounties in the State of Illinois, *in lieu of the quarter patented to said Giles on the tenth day of January, one thousand eight hundred and eighteen, which had been previously patented to James Durney,*" and proved the entry of the northwest quarter of section 28, township 5 north, range 3 west of the 4th P. M., on the 6th day of April, A. D. 1838, by John Shaw, assignee of Giles Edgerton, in pursuance of said act of Congress. (Record, folio 31.)

Plaintiff in error then produced in evidence the original patent issued to Giles Edgerton upon the location of warrant numbered 13,598, which patent bore date January 10, 1818, and granted to Giles Edgerton the *south*-east quarter

of section 18, in township 4 north, range 2 east, in the tract of land appropriated for bounties in the Territory of Illinois, and described said Edgerton as late a sergeant in Cotton's company of the 26th regiment of infantry. (Record, folio 32.)

3. *Instructions.*

Upon this evidence the court was asked by plaintiff in error to give the following instructions, which the court refused to give, and to which refusal the plaintiff excepted.

"1st. The jury are instructed the plaintiff has by legal evidence shown title in himself in fee-simple to the land in controversy, and that the defendants have not shown outstanding title in Giles Egerton, or any one claiming under him, and therefore the plaintiff is entitled to recover.

"2d. The jury are instructed that the limitation laws of Illinois do not confer any rights upon defendants in this cause, except so far as such laws may apply, and rights accrue thereunder, since the issue of the patent to Leonard.

"3d. The jury are instructed that no tax-title to the land in controversy could accrue under the laws of Illinois prior to the issue of the patent to Leonard."

The court then instructed the jury on behalf of defendants under plaintiff's objections and exceptions as follows:

"1st. The jury are instructed that the defendants have proved that the land in controversy was granted by the United States to Giles Egerton on the 10th day of January, 1818, and that said Egerton, in July, 1819, granted and conveyed the same to Thomas Hart, which conveyance constitutes an outstanding title that defeats the plaintiff's right of recovery, and the verdict should be for the defendants.

"2d. The jury are also instructed that the defendants have shown that on the 10th day of January, 1818, the land warrant in favor of Giles Egerton was duly located on and upon the land in controversy, which location is not shown to have been vacated or set aside, and therefore said land was not subject to entry by or grant to Edward P. Leonard in 1868, and the finding should be for the defendants."

Verdict was given by the jury for defendants, motion for new trial overruled, and judgment rendered by the court for defendants against plaintiff's objections and exceptions.

The questions involved are:

1. Did plaintiff show a valid legal title?

2. Did the legal title to the northeast quarter pass to Giles Egerton?

3. Could an equitable right to a patent based upon location of a warrant be set up in an action at law by a third person to defeat a legal title?

4. Were the tax sale and sheriff's deed, under which defendants claim, valid, so as to divest the United States of its title?

5. Were the rulings of the court correct, and did the instructions given to the jury upon the evidence correctly state the law in this case, and was the verdict according to the law and evidence.

II.

ASSIGNMENT OF ERRORS.

1. The Court erred in admitting in evidence the deed from the sheriff of Fulton county, Illinois, to Thomas Gridley, and the mesne conveyances from Gridley to themselves, and the evidence of occupancy, cultivation, and payment of taxes upon the northeast quarter.

2. The Court erred in refusing to give each of the instructions asked to be given to the jury, by the plaintiff in error, heretofore set forth.

3. The Court erred in improperly giving to the jury, at the instance of the defendants in error, each of the following instructions:

"1st. The jury are instructed that the defendants have proved that the land in controversy was granted by the

× Calvin v Bronson 44 Cal 371
French v Tyson et al 3 Otto 171

United States to Giles Egerton, on the 10th day of January, 1818, and that said Egerton, in July, 1819, granted and conveyed the same to Thomas Hart, which conveyance constitutes an outstanding title that defeats the plaintiff's right of recovery, and the verdict should be for the defendants.

"2d. The jury are also instructed that the defendants have shown that on the 10th day of January, 1818, the land-warrant in favor of Giles Egerton was duly located on and upon the land in controversy, which location is not shown to have been vacated or set aside, and therefore said land was not subject to entry by or grant to Edward F. Leonard in 1868, and the finding should be for the defendants."

"4. The Court erred in overruling the motion of plaintiff for a new trial, and in refusing to grant a new trial, and erred in not setting aside the verdict of the jury, because the same was against the law, and against the law and evidence in the case.

5. The Court erred in rendering judgment upon the verdict in favor of defendants.

III.

BRIEF OF POINTS AND AUTHORITIES RELIED UPON BY PLAINTIFF IN ERROR.

1. *Plaintiff's Title.*

1. The patent to Leonard vested in him a perfect title.

A patent carries the fee, and is the best title known to a court at law. (Hooper *vs.* Scheimer, 23 Howard, 235.)

It is a better legal title than a prior entry. (Carman *vs.* Johnson, 20 Miss., (5 Bennett,) 108.)

In an action at law, the patent from the United States for part of the public lands is conclusive.

Bagnell *vs.* Broderick, 13 Peters, 436.

The patent is prima facie Evidence of title that all the incipient steps had been taken before the title was perfected by the patent

Minter v Crommelin 18 How. 87

Polks Lessees v Wendell 9 Cranch 98

X

Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Government in reference to the public lands declares the patent to be the superior and conclusive evidence of title.

Ibid.

UNTIL IT ISSUES *the fee is in the Government*, which passes by the patent to the grantee, and *he is entitled to recover the possession in ejectment.*

Ibid.

2. The Government would be estopped from denying at law the validity of its own grant. (Branson *vs.* Wirth, 17 Wall., 42.)

3. The defendants cannot impeach the grant or contest the validity of the patent unless they show it conflicts with their better right. Hamlen v Humphill 6 Mo 114 Houck v Kelley 17 Kansas 939

Defendants in Error Cannot Question the Validity of Leonard's Patent.

They show no title or right in themselves, and the patent is as conclusive against them as against the Government.

Stringer *et al. vs.* Lessees of Young, 3 Peters, 340, 341.

In construing the meaning of the fifteenth section of the act of March 3, 1851, which provided "That the decree of confirmation and patent shall be conclusive between the United States and claimants only, and shall not affect the interests of third persons," this Court, in Beard *vs.* Federy, 3 Wall., 491, held that an intruder, resting solely upon his possession, could not attack the patent. The Court says:

"The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but *only those who hold* SUPERIOR *titles*, and such as

In the Supreme Court of the United States.

OCTOBER TERM 1878.

ANDREW C. BRADLEY, &c.,
vs.
THE UNITED STATES. } No. 775.

BRIEF FOR THE UNITED STATES.

As a satisfactory presentation of the considerations upon which the United States now rely in this case, I beg leave to refer to, and adopt, the opinion of the learned court below, beginning upon folio 34 of the Record.

S. F. PHILIPS,
Solicitor-General.

Nov 19. 78 Arg^d N. H. Swayne

8 Otto, 1 15

Oct. 1. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 330.

JACOB WIRTH, PLAINTIFF IN ERROR,

vs.

CALVIN BRANSON AND NATHAN LINDSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 22, 1875.

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Beard *vs.* Fedrey, 3 Wall., 493.

Moore v Robbins 6 Otto 533

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that purpose. Maslen v Earle 3

Patterson *vs.* Wilson, 11 Wheat, 381-

Polk's Lessees *vs.* Wendell, 9 Cranch

~~McCreary et al. vs. Goldsmith et al.~~, 1

Jackson *vs.* Hart, 12 Johns, 77.

Moore v Robbins 6

2. *Egerton's Title.*

1. *Egerton had, upon location of warrant, an equitable right to, but not, in fact, the legal title.*

The legal title to the northeast quarter did not pass from the United States until the issue of the patent.

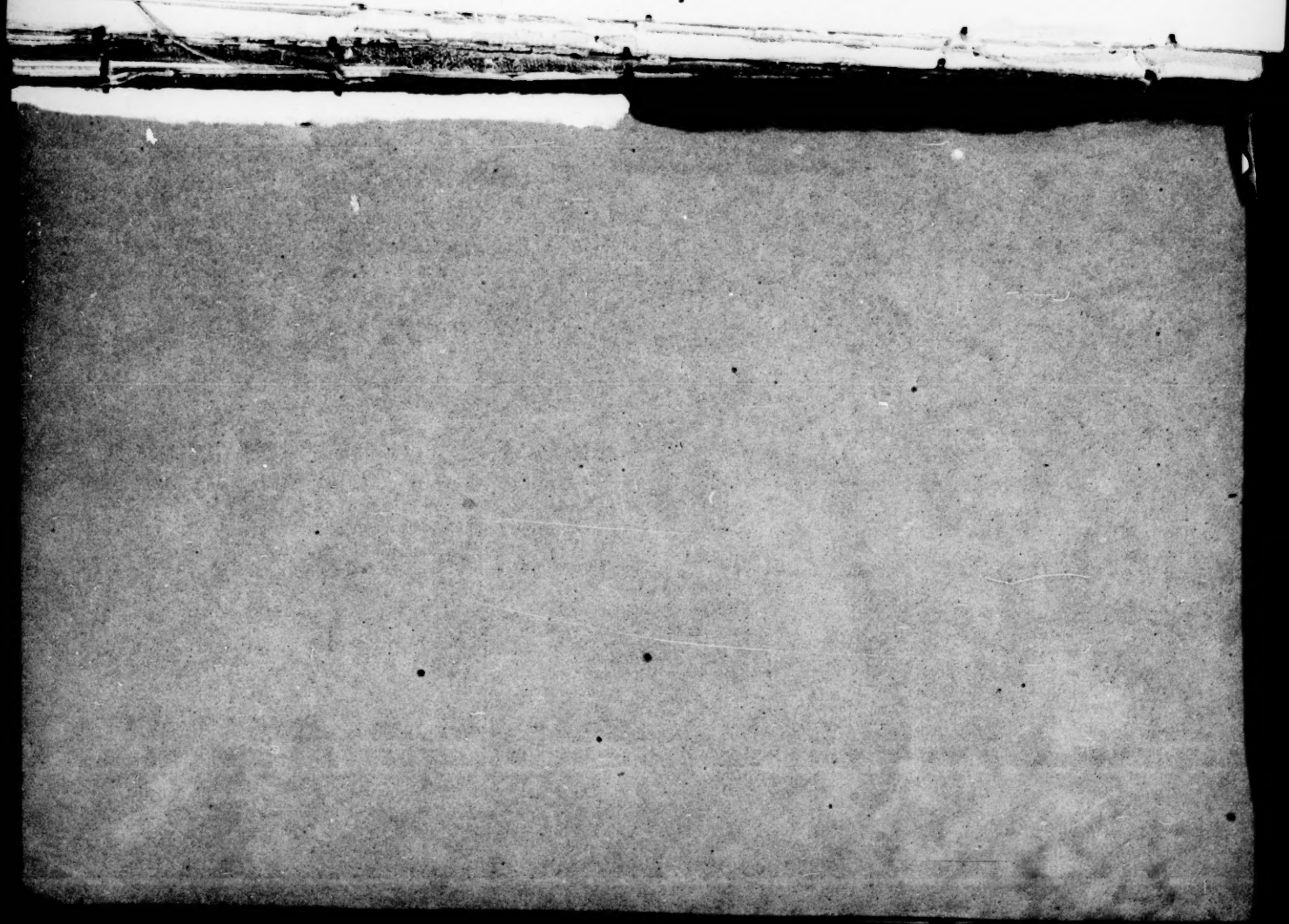
The location of Egerton's bounty warrant, No. 13598, upon the land did not convey to him the legal title.

It gave him a right of conveyance, which right he could waive or relinquish.

To make a complete transfer of title from the United States, the law provided for the execution of a patent, signed by the President, sealed with the seal of the General Land Office, and countersigned by the Commissioner. (§ 7, act April 25, 1812, 1 Brightly's Digest, 465.)

The legal title does not vest until the patent issues. (Sweat *vs.* Corcoran, 13 Miss., (8 George,) 513.)

The title of the United States can only pass by patent or by act of Congress, in words of present grant. (Wilcox *vs.*



will enable *them* to resist successfully any action of the Government in disposing of the property."

Beard *vs.* Fedrey, 3 Wall., 493.

Moore v Robbins 6 Otto 533/ 118 v Stone 2 Wall 5.24

A patent issued by the United States cannot be impeached or avoided, *in an action at law* or *any collateral* action, but upon bill in chancery or *scire facias* instituted directly for that purpose. Marlin v Carter 3 Porter 368

Patterson *vs.* Wilson, 11 Wheat, 381–4.

Polk's Lessees *vs.* Wendell, 9 Cranch, 98–9.

~~McCreary et al. vs. Goldsmith et al.~~ Bagley v Cleveland, 18 How., 87.

Jackson *vs.* Hart, 12 Johns, 77.

Moore v Robbins 6 Otto 530

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Jackson, 13 Peters, 499: Gibson *vs.* Chanteau, 13 Wallace, 92.)

The patent passes the fee, and prior to its issue the title is inchoate and incomplete.

Stringer *et al. vs.* Lessee of Young, 3 Peters, 320, 349.
Boardman *et al. vs.* Lessees Reed & Ford, 6 Peters, 328.
Bagnell *vs.* Broderick, 13 Peters, 436.
Bush *vs.* Ware, 15 Peters, 93.
Stoddart *vs.* Chambers, 2 Howard, 284, 318.

The act of Congress of May 27, 1840, gave the soldier the right to surrender, under certain circumstances, his patent, and re-locate his warrant.

5 U. S. Statutes at Large, page 380.

A patent, though signed, sealed and recorded, may, before delivery, in case of mistake, fraud, &c., be recalled and corrected or canceled.

Bell *vs.* Hearne, 19 Howard, 252.
Phillips *vs.* Shearman, 36 Ala., 189.
Opinion Att'y Gen., Land Laws, vol. 2, p. 28.
" " " " 24.
" " " " 6.
" " " " 160.
" " " " 86, 87.
Regulations May 4 and 6, 1836, vol. 2, pp. 92, 93.

In Bell *vs.* Hearne, 19 Howard, 252, an entry had been made by John Bell, in 1839, but through a mistake the patent was made out to James Bell, in March, 1844, and forwarded to the district land office, where it remained until 1849, when the mistake was discovered and the patent returned to the General Land Office and canceled. Judgment creditors of James Bell, in July, 1844, levied upon the land.

and the purchaser obtained a sheriff's deed. This Court, in approval of the action of the commissioner, and sustaining the title of John Bell against the grantees of James Bell, said:

"The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his Department, and is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertance, irregularity, mistake and fraud, in the important and extensive operations of that officer for the disposal of the public domain.

"The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department."

2. *Patent for* NORTHEAST *quarter never issued to Egerton, and legal title to that tract never passed to him.*

No patent for the *northeast* quarter was ever issued to Giles Egerton upon his location of land warrant No. 13,598.

The original patent issued to him upon the location produced in evidence shows that it purported to grant the *southeast* quarter, instead of the *northeast* quarter, upon which the warrant had been located.

Giles Egerton never conveyed, nor pretended to convey, the northeast quarter, but conveyed to Hart the southeast quarter, for which he declared in his deed to Hart he had a patent, and which the production of the original patent shows to be true. Record not better Evidence than Original Taylor v Brown 5 Cranch 2 34, McCunningham v Mining Co 6 Ohio 316

3. *Defendants' Tax Title.*

Defendants claim title in themselves only through the sheriff's tax deed, and possession under it.

I. The patent not having issued for the northeast quarter until 1868, the tax sale and tax deed prior thereto were absolutely void.

Bounty lands in the State of Illinois granted for military service during the war of 1812, while held by the patentees or their heirs, were exempt from State taxation for the term of three years from and after the date of the patents.

The State of Illinois, by ordinance adopted August 26, 1819, accepted the propositions of the United States in regard to taxing the public lands, and ordained and declared:

"That every and each tract of land sold by the United States from and after the first day of January, 1819, shall remain exempt from any tax laid by order or under any authority of the State, whether for State, county, or township, or any purpose whatever, for the term of five years from and after the day of sale. And that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt, as aforesaid, from all taxes for the term of three years from and after the date of the patents respectively."

R. S. Ill., (1874) p. 31.

The act of the State of Illinois under which the tax sale purported to have been made exempted from tax lands belonging to the United States and such other lands as were exempted from taxation by the compact between the State and the United States.

It provided—

"That all lands claimed by individuals or bodies politic or corporate, whether by deed, entry, bond for conveyance, patent, grant, or otherwise, except town lots, lands belonging to the United States or this State, and such other lands as are exempted from taxation by virtue of the compact between the United States and this State, are hereby declared subject to taxation."

Compiled of Laws of Illinois, page 561.

II. The deed from Edgerton to Hart was also void.

Egerton could make no valid transfer of the land until after the patent had been issued and delivered to him.

Act of April 16, 1816, § 5, 3 Stat. U. S. Stat. at Large, p. 287.

The act of 1812 authorizing the issue and location of military bounty land warrants prohibited and made void any sale of the claims or warrant, and any alienation of the land until the patent had been granted.

2 U. S. Statutes at Large, p. 729.

The purchaser at tax sale before a patent was issued could not set up in an action of ejectment the tax deed against the patentee.

Stuart *vs.* O. Parish, 6 Ohio Rep., 477.

III. Defendants in error acquired no rights against the United States by possession under a void tax sale. The statutes of limitation do not run against the State or the United States.

United States *vs.* Hoar, 2 Mason, 312.
Gibson *vs.* Chauteau, 13 Wallace, 92.
People *vs.* Gilbert, 18 Johnson, 228.

IV.

ARGUMENT.

The questions presented in this case for consideration and decision are:

1. The validity of plaintiffs' title, and how and by whom can it be attacked?

2. Egerton's title. Was patent issued?

3. Defendants' tax title. Was the land taxable, and did defendants acquire the legal title?

I shall, in argument, restate but a portion of the points presented in the brief, and direct attention chiefly to some of the arguments heretofore and now urged by defendants' counsel.

1. *Plaintiff's Title.*

The patent to Leonard and deed from latter vested in plaintiff a perfect legal title.

If void against better equitable right it is valid against strangers, intruders and trespassers.

It is a legal title that a bare equity will not defeat in an action at law.

2. *Egerton's Title.*

At the former hearing of this case it was contended by the plaintiff's counsel that Egerton having asserted in his deed to Hart that the patent issued to him for the *southeast* quarter, upon the location of his military bounty land warrant No. 13,598, and the Government having granted to a subsequent grantee of Hart's another quarter section in satisfaction of the equitable right of the grantee to have the warrant located on another tract, Egerton would be estopped, as against the Government and plaintiff, from claiming and showing that his patent was not for the southeast quarter, as he had asserted in his deed to Hart, and from showing that it was actually for the northeast quarter.

The court held, in Branson *vs.* Wirth, 17 Wallace, 40, that the restitution made by the Government to Shaw, Egerton's remote grantee, based upon the statements in Egerton's deed to Hart that the patent issued upon the location of warrant No. 13,598 was for the *southeast* quarter of section eighteen, did not estop Egerton from claiming title, as against the Government, to the northeast quarter if the patent was actually for the *northeast* instead of the *southeast* quarter.

The conclusion of the court is:

"That there was no estoppel shown by the evidence which would prevent the defendants from showing the truth of the case as to which quarter section was actually granted to Giles Egerton by his patent of January 10, 1818."

Branson *vs.* Wirth, 17 Wallace, p. 43.

And the Court held that the exemplified copy of the record is better evidence of the patent and its contents than the statement of its contents in Egerton's deed to Hart, the marginal entry on the records and the recitals in the act of Congress.

The Court proceeds to say:

"Had the patent itself been exhibited on the trial it would have ended all controversy on the subject. But it was not exhibited, and it did not appear what had become of it."

The original patent issued to Giles Egerton was produced at the last trial, and is before the court in this case.

Upon inspection of the patent it appears that—

A patent for the NORTH-*east quarter was not issued to Egerton.*

The original patent issued to him upon location of his warrant number 13,598 shows it was for the *south*-east instead of the *north*-east quarter of section eighteen.

The record brought face to face with the patent issued discloses a variance in the record from the original.

The question now presented, is: In case of variance between the patent itself and the record of it, which is the better evidence of its contents?

It seems unnecessary to adduce authorities to show that an instrument being produced is better evidence of what it is and contains than any statement or copy of its contents, official or unofficial.

Its production in evidence may by statute be dispensed

with, and in its absence a copy made evidence of equal dignity.

But no law of the United States makes the record of a patent better evidence of its contents than the patent.

The counsel for the defendants in error contended at the former hearing that, as the law directs the recording of patents, it is the record and not the execution that gives validity to the patent. He would make the clerical act of transcribing the patent more efficacious than its execution, including the signature of the President.

The authorities cited by him are mostly decisions in regard to Mexican grants. They are given in cases requiring a construction of the treaties between the United States and Mexico, or other countries, ceding territory, which treaties guaranteed to respect the grants made by such foreign country prior to the cession. They relate to the language both of the treaty and of the laws of the foreign country, and not to patents issued under the laws of the United States.

They were not cases where a variance was claimed between the record and the original. In U. S. *vs.* Vallejo, 1 Black., 552, the court decided that under the laws of Mexico and treaty of Guadalope Hidalgo, a record of the public archives was necessary to substantiate an alleged grant.

Not one of the cases cited by defendants in error decides that a patent from the United States, duly executed, is invalid unless recorded in the General Land Office. Much less does any case affirm that the record of a patent is better evidence of the grant contained in the patent than the patent itself, when produced.

See 6 Otto 810

Were there two Giles Egertons, and a patent issued to each?

Defendants in error claimed, and perhaps will still claim, that two patents may have issued. But, as only one patent

could issue, under the law, to each soldier for military service in the war of 1812, they suggested there may have been two Giles Egertons, each entitled to a patent, the one obtaining a patent for the *northeast*, and the other a patent for the *southeast* quarter of section eighteen.

The specific descriptions of the soldier in the records and patent, refute such a supposition.

The patent actually issued and produced by plaintiff in error, and the erroneous record of the patent, both have the same designation and description of Giles Egerton; he was late a sergeant in Cotton's company of the 26th regiment of infantry, and he had "deposited in the General Land Office a warrant in his favor, numbered 13,598." To presume that there were two soldiers by the name of Giles Egerton, both serving in the same regiment and company, and both sergeants, and that, by the chance location then required by law, each drew a quarter section in the same range, township and section, would be marvelous, and exceedingly improbable.

But there could not be two Giles Egertons holding land warrants in their favor, *bearing the same number*. In the patent granting the southeast, and the erroneous record purporting to be a copy of the patent, Giles Egerton was in the 26th regiment of infantry, *was in Cotton's company*, was a *sergeant*, had a bounty land warrant in his favor, *numbered* 13,598.

The patent actually issued, and the record of the patent relied upon by defendants, are each upon the same location, of the same bounty land warrant, having a specific number, and belonging to a soldier bearing the same description in the patent produced, the exemplified copy of record of patent, and the record of location.

There is not a particle of evidence that there were two Giles Egertons. But one Giles Egerton had or could have military bounty land warrant No. 13,598, and that Egerton is the Egerton who deposited that warrant in the

General Land Office, as is so declared to be, and is the Egerton described in both the record and the patent itself.

The evidence of the mistake cannot be avoided by this theory.

The variance is manifest; the mistake is easily accounted for. A patent was issued to Giles Egerton; there was an error in the record. This appears from the patent itself, from the conduct of Giles Egerton and his grantees, who never asserted title to the *northeast* quarter, and is consistent with all the evidence in the case.

TITLE OF DEFENDANTS IN ERROR.

The cases which have held that public lands are taxable after entry or location of warrant, before patent issues, have arisen in States where the compact exempted from taxation the lands or the property of the United States.

The cases in Ohio, in Michigan, and Arkansas were all of this character. But the compact with Illinois was not to tax the bounty lands while owned by patentee until three years AFTER THE DATE OF THE PATENT, and alienation was invalid ~~by United States title~~ by patentee until issue of patent.

This compact exempted Egerton's location from State taxation until patent issued, and invalidates the tax sale and tax deed.

Defendants in error show no title except what may have accrued through the tax proceedings and sheriff's deed. They do not connect themselves with Egerton, whose title they set up, as his direct or voluntary grantee. They claim a naked legal title, based on occupancy, possession, payment of taxes, and a paper title, to bar, under the statutes of Illinois, the plaintiff in error, and equally a bar against the title of Egerton or Hart, whom they claim to be really the owners of the land.

If the title to the land remained in the United States,

they are in fact trespassers upon the public domain, without legal or equitable right. They have occupied these lands, and appropriated their products, cultivated them at the time of their highest fertility, without payment of rent or compensation of any kind. They cannot justly complain that the Government or its grantee, under the laws of the United States, asserts ownership and demands possession.

HORATIO C. BURCHARD,
For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1878.

No. 69.

JACOB WIRTH, *Plaintiff in Error*,
v.
CALVIN BRANSON and NATHAN LINDSEY,
Defendants in Error.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

Brief and Argument for the Defendants in Error.

By S. CORNING JUDD.

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Brief and Argument for the Defendants in Error.

I.

STATEMENT OF THE CASE.

This was an action of ejectment, brought by the plaintiff in error against the defendants in error, June 11th, 1869, in the Circuit Court of the United States for the Southern District of Illinois, for the recovery of the *North* East quarter of Sec. 18, 7 N., 4 E. of the 4th P. M., situated in Fulton County, Illinois, the declaration claiming the title in fee simple, and the defendants pleading the general issue. (Record, pp. 2, 3 and 4.)

The case was tried at the June term, A. D. 1875, of the Circuit Court of the United States for the Southern District of Illinois, before Mr. Justice DAVIS, then a member

of this court, and Judge TREAT, with a jury, the latter, under the instructions of the court, returning a verdict for the defendants, etc.

On a former occasion a trial of the case in the court below resulted in a verdict and judgment for the plaintiff, which judgment, on writ of error to this court, was reversed, the case being reported in 17th Wall., p. 32, *et seq.*

For some unaccountable reason the record of the former trial is inserted in full in the record at bar. The bill of exceptions taken by the plaintiff in error on the last trial below, resulting in the judgment which is now complained of, will be found at pages 17 to 21, inclusive, of the record. The evidence was substantially the same as that heard on the former trial, except that the plaintiff in error read in evidence an original copy of a recorded patent, (sometimes called the original patent,) for the *South* East quarter of 18, delivered to the soldier, Giles Egerton.

1. Plaintiff below on the trial sought to recover as the grantee of Edward F. Leonard, who obtained a patent for the land in controversy February 20th, 1868, which patent recited the location of the land as being "in the district of "lands subject to sale at Springfield, Illinois." (Record, p. 17, folio 25.)

2. The defendants then read in evidence a duly exemplified copy of Military Land Warrant No. 13,598, and of a memorandum and endorsement thereon, exemplified and authenticated by the Commissioner of the General Land Office, June 1st, 1870; which warrant (dated December 3, 1817,) and the memorandum and endorsement thereon, (copied at folios 25 and 26 of the record,) together with an exemplified record by said General Land Office, of the location of said land warrant, read in evidence, show that, in pursuance of acts of Congress recited, Giles Eger-

ton, then late a sergeant in Captain Cotton's Company of the 26th Regiment U. S. Infantry, was entitled to 160 acres of land, to be located on the public domain appropriated for the grantees of such military land warrants, and that said land warrant, No. 13,598, was located according to law January 10, 1818, in favor of said Giles Egerton, on the *North* East ¼ 18, 4 N., 2 E., etc., in the Illinois Military Bounty Tract. (Record, folios 25, 26, 27.)

3. Defendants then read in evidence an exemplified copy (from the record of the Illinois Military Bounty Land Patents, in the General Land Office, at Washington,) of a patent from the United States to said Giles Egerton, dated January 10, 1818, granting to said Egerton the said *North* East of Sec. 18, 4 N., 2 E., etc. The said patent recites "that in pursuance to acts of Congress, appropriating and "granting land to the late army of the United States, "passed on and since the 6th day of May, 1812, Giles "Egerton having deposited in the General Land Office a "warrant in his favor, No. 13,598, there is granted unto "the said Giles Egerton, late a sergeant in Cotton's Com-"pany of the 26th Regiment of Infantry, a certain tract "of land containing 160 acres, being the *North* East quar-"ter of section eighteen," etc., as above described. (Record, folio 27.)

4. On the margin of said exemplified copy of said patent is a memorandum, copied as follows:

"(Endorsed.) This patent was issued for the S. E. ¼ "instead of the N. E., as recorded; sent a certificate of "that fact to E. B. Clemson, at Lebanon, Ills.; see his let-"ter of 19th May, 1826."

The word "(Endorsed)" in the said memorandum is in black ink, and the rest of the memorandum is in red ink.

The plaintiff insisted upon said memorandum's being read to the jury as a part of said exemplification, but, the

defendants objecting thereto, the court refused to allow the same to be read. (Record, folios 27 and 28.)

5. The defendants then read in evidence a deed dated July 29th, 1819, from Giles Egerton to Thomas Hart, duly recorded, etc., which deed grants to said Hart the following described land:

"The South East quarter of Sec. 18, 4 N., 2 E., etc., "*which quarter section was granted to said Giles Egerton*, "in consideration of his *military services, as will appear by* "*a patent obtained from the general government, dated the* "*10th day of January*, 1818." (Record, folio 28.)

6. The defendants then read in evidence an exemplified copy of a patent from the United States to James Durney, dated Jan. 7, 1818, granting to said "James Durney, late a "private in Oglevie's company, of the 13th regiment of "infantry, the South East quarter of Section 18, Township "4 North, in Range 2 East, in the tract appropriated for "Military Bounties, in the Territory of Illinois."

Said patent recites the deposit of land warrant No. 5,144, etc., as the basis of the grant. (Record, folios 28 and 29.)

7. The defendants then read in evidence, a deed from the Sheriff of Fulton County, (in which county the land is located,) to Timothy Gridley, dated Nov. 14th, 1843, for the *north*-east quarter of the aforesaid Section 18, in Fenton County, Illinois, for the taxes, etc., for the year 1839, and under a judgment for the same at the June Term, 1840, of the Circuit Court of Fulton County, aforesaid: and they also read in evidence several mesne conveyances from said Gridley to themselves, inclusive, of said north-east quarter of Sec. 18, by which whatever title or right the said Gridley acquired under said sheriff's deed was conveyed to them: the deed to the defendants of such title bearing date in Feb., 1849.

And the defendants also proved that they and their grantors had occupied, cultivated and had full and undisturbed possession of the whole of said *north*-east quarter section ever since Nov., 1843, the whole thereof being under fence and cultivation, and that for the years 1844 to 1868, inclusive, they and their grantors paid all taxes and assessments levied and assessed on or against said land, they and their grantors paying respectively when they respectively held said land under said title. (Record, folios 29 and 30.)

The plaintiff objected to such evidence in regard to said tax title, and the payment of taxes, but was overruled by the court, whereupon he excepted.

8. The land in controversy was shown to be worth more than $5,000 at the time of the trial.

9. Against defendant's objections for irrelevancy, the plaintiff was permitted to read in evidence a deed from Thomas Hart to Samuel F. Hunt, dated May 12th, 1824; also a deed from Samuel F. Hunt to Eli B. Clemson, dated April 7th, 1825; also a deed from Eli B. Clemson to John Shaw, dated Oct. 20th, 1829; each of which was for the *south*-east quarter of said Sec. 18. (Record, folios 30 and 31.)

10. Under the defendant's like objection for irrelevancy the plaintiff was permitted by the court to read in evidence from the 6th U. S. Statutes at Large, (Private Laws,) p. 366, an Act of Congress entitled "An Act for "the relief of the *legal* representatives of Giles Egerton," approved March 3, 1827, "authorizing the *legal* represen- "tative or *assignee* of Giles Egerton, late a sergeant in "Cotton's Company," 26th Reg't., Infantry, to enter any unappropriated quarter section of land in the Illinois Military Bounty District, "in lieu of the quarter patented to "said Giles on the 10th day of Jan'y, 1818, which had

" been previously patented to James Durney;" also authorizing a patent to issue for the land upon such entry. (Record, folio 31.)

Under like objection by defendants, the plaintiff, by permission of the court, proved that John Shaw, April 6, 1838, entered with the Register of the Land Office at Quincy, Ill., the N. W. of 28, 5 N, 5 W. of the 4th P. M., in pursuance of said Act of Congress. (Folio 32.)

11. Under defendants' objections, the plaintiff was also permitted to read in evidence a patent dated Jan. 10, 1818, by the U. S., granting to Giles Egerton, the S. E. ¼ of Sec., 18, 4 N., 2 E., in the tract of land appropriated for Military Bounty patents in the Territory of Illinois, in which patent said Egerton is described as " late a sergeant " in Cotton's Co., 26th Reg't., Infantry," and in which patent it is recited that " Giles Egerton having deposited " in the General Land Office a warrant in his favor, No. " 13,598, there is granted unto the said Giles Egerton," etc. (Record, folio 32.)

This was all the evidence offered by either of the parties.

12. The court refused to give the following instructions asked by plaintiff, viz:

" 1st. The jury are instructed the plaintiff has, by legal evidence, shown title in himself in fee simple to the land in controversy, and that the defendants have not shown outstanding title in Giles Egerton, or in any one claiming under him, and therefore the plaintiff is entitled to recover."

" 2d. The jury are instructed that the limitation laws of Illinois do not confer any rights upon defendants in this case, except so far as such laws may apply, and rights accrue thereunder since the issue of the patent to Leonard."

" 3d. The jury are instructed that no tax title to the land in controversy could accrue under the laws of Illinois

prior to the issue of the patent to Leonard." (Record, folio 33.)

13. But the court gave to the jury the following instructions asked by the defendants, to wit:

"1st. The jury are instructed that the defendants have proved that the land in controversy was granted by the United States to Giles Egerton, on the 10th day of Jan'y, 1818, and that said Egerton, in July, 1819, granted and conveyed the same to Thomas Hart, which conveyance constitutes an outstanding title that defeats the plaintiff's right of recovery, and the verdict should be for the defendants."

"2d. The jury are also instructed that the defendants have shown that on the 10th day of January, 1818, the land warrant in favor of Giles Egerton was duly located on and upon the land in controversy, which location is not shown to have been vacated or set aside, and, therefore, said land was not subject to entry by, or grant to, Edward F. Leonard, in 1868, and the finding should be for the defendants." (Record, folio 34.)

The plaintiff excepted to the giving of such instructions asked by the defendants; whereupon the jury rendered a verdict of "Not Guilty" for the defendants.

II.

Summary of Facts and Points.

The salient facts and points may be summarized as follows:

1st. The plaintiff below claimed under a patent to Edward Leonard (of Feb. 20th, 1868) *fifty* years the junior of that to Giles Egerton (of Jan. 10th, 1818), for the same quarter section, set up by the defendants with a conveyance by Egerton to Thomas Hart, in 1819, as showing an outstanding title. (Record, folios 25, 27, 28.) The deed from Egerton to Hart, it is true, purports to convey "the south-east quarter of section 18," etc., but it *also*

describes the land as "which quarter section was granted "to the said Giles in consideration of his military ser- "vices, as will appear by a patent obtained from the "general government, dated 10th day of January, A. D. "1818." (Record, pp. 18, 19; folio 28). Reference to the grant introduced in evidence shows that the quarter was the *north*-east, and not the *south*-east, of 18. The law is that, where there is a double description of this kind, effect will be given to the *proper* description, and that the mis-description will be rejected as overplusage.

2d. The grant of the *north*-east quarter to Egerton, as recorded in the land office at Washington (and which recites, as the foundation of the grant, the location of land-warrant No. 13,598 by Egerton on said quarter), is superior to any copy or supposed copy of the grant delivered to the soldier, called a "patent," but which, in reality, is not a patent, being only a copy thereof, as evidence of a grant, any errors in which copy being controlled by the original or record of the grant.

This senior grant or patent has never been vacated or set aside by any department of the government; nor has it in any way been impeached or even questioned, unless the *memorandum* endorsed on the margin of the record of the original grant by *somebody* (nobody knows by whom) shall be construed as an impeachment, and which memorandum is not competent evidence, as this court expressly held when the case was here under the former writ of error (*Branson* v. *Wirth*, 17 Wallace, 32, 44), for which reason it was excluded on the trial below.

[By reason of this marginal memorandum, and of the conveyances of the *south*-east of Sec. 18, and of an Act of Congress, read in evidence by plaintiff (Record, pp. 19, 20), and Shaw's entry of a tract under authority of said Act, it is claimed on behalf of plaintiff in error that an

estoppel *in pais* was created, which overturned the defense.

There was no evidence connecting the defendants with either of the patent titles, except that they sought to protect their possession of the land in controversy by setting up an outstanding title through the senior grant or patent.

Even if there was an estoppel as to the *holder* of the *title* of the *south*-east quarter (which there was not), it nevertheless remains to be explained *how* any such estoppel theory put the *title* of the *north*-east quarter in controversy back into the United States, and rendered the land *subject to entry* and sale, *so as to give any force* to the Leonard patent of 1868, under any view of the matter. Moreover, if the title was not re-invested in the United States, then the land was subject to the taxation through which the defendants below acquired their rights. No estoppel by matter *in pais*, such as urged, could divest the State of Illinois of *the right of taxation*, so long as either the land-warrant location or the legal title remained as it did.

But even if the marginal memorandum referred to, and the recitals of the Act of Congress are to be taken as true (for which there is neither law nor common sense), and even if *the* Egerton of the senior patent is regarded as the *same* Egerton referred to in the Act, and, moreover, even if said Act can by forced construction be considered as having *intended* reference to the *north*-east quarter and even if Hart *intended* to convey said *north*-east quarter (instead of the "*south*-east," described in said deed, and also in the other deeds down into Shaw), yet, nevertheless, the utmost that the proof can be construed to show is, that an *equitable* title to the *north*-east quarter passed into Shaw, so that *Shaw*, by reason of the matter *in pais* (if he can be said to have entered other land, under the Act of Congress, "in lieu" of said *north*-east quarter, which is not the fact),

might *in equity* be estopped from claiming such *north*-east quarter, as against the United States, or its subsequent grantees. And even under the utmost hair-splitting construction of the proofs heard or offered, competent and incompetent, it cannot be pretended that even an imaginary *equitable* title to said *north*-east quarter was put back into the United States, at the date when Shaw availed himself of the Act of Congress, or at any other time.

3d. The Act of Congress authorizing an entry of another tract by the "*legal assignee* of Giles Egerton," had no reference to the *north*-east quarter of 18, in controversy; for, *first*, while the Act (though its recitals are of no effect to impeach the senior grant), declares that said entry was authorized, "in lieu of the quarter patented "Jan. 10, 1818," to *the* Giles Egerton referred to in the act, yet *there is no evidence that there were not two sergeants in Cotton's Company of the 26th Infantry bearing the same name of Giles Egerton; and the law raises no presumption that there were not in reality two sergeants of that name in the Company*, but the courts *will* presume until the contrary is shown, that the patent of January 10th, 1818, referred to in the Act of Congress, *was to another and different Giles Egerton*, than the one mentioned in the senior grant or patent, read in evidence by the defendants (as is expressly held in *Montag* v. *Linn*, 23 Ill., 508-9, 511-12); and, *secondly*, the Act expressly recites *also* that such entry was authorized "in lieu of the quarter" "*which had been previously patented to James Durney*," and which quarter the unquestioned evidence (the patent to said Durney, dated Jan. 7th, 1818) proves was the *south*-east (and not the *north*-east) of 18. [Record, p. 20; folio 31.]

Besides, the Act of Congress proves nothing. Recitals of supposed facts in a private act are not evidence of the

existence of any such facts, except as against those who apply for the act—*Branson* v. *Wirth*, 17 Wall., 41.

4th. Even if the Act be considered as having *possible reference* to the *north*-east of 18, yet, nevertheless, the prominent fact stands out that there is no pretense of any attempt by Thomas Hart to convey said *north*-east quarter; hence, Thomas Hart is the only "legal assignee "of Giles Egerton," as to that quarter. Hart's deed to Hunt was for the *south*-east quarter, with no mention of, or reference to, the *north*-east; and there is no evidence that Hart did not own the *south*-east of 18, as well as the *north*-east, when he conveyed the former to Hunt. The court will not presume that he did not own it.

5th. There is no evidence in the record that the original copy of the grant or patent was issued to the soldier by mistake or otherwise, for the *south*-east instead of the *north*-east quarter, unless the memorandum on the margin of the record, undoubtedly made by some *clerk*, in 1826, (or, so far as appears in this case, clandestinely made by some land-shark in the interest of the plaintiff below,) is to have the effect of contradicting or vacating the solemn record of the government, or, unless the mere fact that a patent, (or copy of a grant,) was produced in evidence as having been issued to a man by the name of "Giles Egerton," for the *south*-east quarter, is held to afford such evidence. But it would be an awkward process of reasoning to argue that because a patent, (or copy of a grant) was issued to a person of the name of Giles Egerton, for the *south*-east quarter, therefore a patent could not have been issued to the same or some other Giles Egerton for the *north*-east quarter also.

6th. Hart, the only "legal assignee of Giles Egerton," of the *north*-east quarter, never availed himself of any privileges under the act of Congress referred to, even if

that act can be construed as having any reference to the *north*-east quarter.

7th. John Shaw, who did avail himself of the act of Congress, *has never re-conveyed to the United States*, either the *north*-east or the *south*-east quarter, nor has there been any conveyance *either of the north-east or the south-east of 18, back into the United States by any person.*

8th. Giles Egerton's land warrant, No. 13,598, (the same referred to in the senior grant or patent offered in evidence by defendants below,) was located on the *north*-east of 18 in controversy, January 10th, 1818. (Rec. pp. 17 and 18; folios 25, 26 and 27.)

9th. At the time of the commencement of this suit against them, the defendants and their grantors had occupied and cultivated and had full and undisturbed possession of the whole of the tract in controversy, (the *north*-east quarter,) for more than *twenty-five years*, (the whole thereof being under fence and cultivation,) they so holding the same under a judgment and deed for the taxes of 1839 on said land: and during all that time they also paid all the taxes and assessments levied and assessed on or against said land. (Record p. 19; folios 29 and 30.)

III.

Brief of the argument.

I. (1.) First. Hart never conveyed the *north*-east quarter.

Second. The *mesne* conveyances into *Shaw* are for the *south*-east only.

Third. The act of Congress only authorized the "*le-*"*gal* representative or *assignee* of Giles Egerton" to en-

ter another tract "in lieu of the quarter patented to said "Giles," etc.. "which had been previously patented to "James Durney."—that is, "in lieu of" the *south*-east quarter.

Fourth. No conveyance to Shaw of the *south*-east quarter *was ever recorded:* there is no proof that Leonard had any information of that deed when he got his junior patent.

Fifth. Neither the *north*-east nor the *south*-east quarter was ever re-conveyed to the United States, either by Shaw or any other person.

(2.) It is claimed that the defendants in error are estopped from asserting their rights to the land in controversy.

I reply, first, that there is no estoppel as to the quarter in controversy, (that is, the *north*-east quarter), and, secondly, that the plaintiff in error is in no condition to claim the benefit of an estoppel in any event.

(3.) "No person can rely upon an estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his right." *Deery* v. *Carey*, 5 Wall., 795: 22 Md., 419: 25 Texas, 4: *Burnal* v. *Lynch*, 9 Wall., 313.

(4.) "It is clear that a stranger cannot be bound by, nor take advantage of an estoppel. An estoppel, to be binding, must be reciprocal, and parties and privies only, are bound thereby." *Robinson* v. *Bates*, 3 Metc., 40. See also, 10 Ohio St. R., 63: 49 Me., 539: 9 Mass., 143: 10 N. H., 153: 4 Texas, 11.

(5.) "The doctrine of estoppel is only available to the party for whom it was designed, and not for a stranger." *N. Y. & C. R. R. Co.* v. *Schuyler*, 38 Barb., 534.

(6.) "In modern times there is nothing harsh or unjust in the law of estoppel. It can be used only to subserve the cause of justice and right." *Buckingham* v. *Hanna*, 2 Ohio, (N. S.,) 557.

(7.) "It is essential to an equitable estoppel by matter *in pais* that he who sets it up should show that he has been misled to his hurt." *Brubaker* v. *Okeson*, 36 Penn., 519, 522, and cases cited. *Jewett* v. *Miller*, 10 N. Y., (6 Selden,) 402, 406. See, also, as to this doctrine of estoppel, 1 Seld., (N. Y.,) 394; 3 Hill, 219; 17 Conn., 345; id., 355; 2 Wales, (H. & G.,) 653; 4 Texas, 11.

(8.) Defendants in error had been in the possession and occupancy of the entire quarter section in controversy for 25 years before the junior patent was issued. The junior patentee, Leonard, and his grantee, Wirth, were chargeable with notice of this fact.

"When a party purchases land in the possession of third persons, and without inquiring into his rights, or the character of his possession, he is affected with all the equitable rights of the possessor, and he cannot set up the want of notice to protect himself." *Brewer* v. *Brewer et al.*, 19 Ala., 481.

II. (1.) If there be an estoppel at all, it is at most only *in equity: and an estoppel in equity cannot be asserted in a proceeding at law. Wales et al.* v. *Bogue*, 31 Ill., 468; *Smith* v. *Munday*, 18 Ala., 185; *Jackson* v. *Hart*, 12 Johnson, 77; *Flake* v. *Fash*, 44 Ill., 302–305; 36 Ala., 80, 86; *Miller* v. *Graves*, 38 Ill., 466, and cases cited; 35 Mo., 70.

(2.) "If one, having the *legal title* to land, *induces another to purchase it under execution against him, he is not thereby* estopped, *in a court of law*, from showing that the sale was *void*, and passed nothing to the purchaser." *Smith* v. *Munday*, 18 Ala., 182; 16 Ala., 714.

III. THE HOLDING OF THIS COURT AT THE FORMER HEARING, AS TO THE SUPPOSED ESTOPPEL.

(1.) The holding of this court when the case was formerly heard upon error, brought by the present defendants in error, (see *Branson* v. *Wirth*, 17 Wall., 32), would seem to have disposed of this question of estoppel; but the present plaintiff in error does not seem to so regard it.

Under the state of facts then presented, it was held by the court, that the "*estoppel related* ONLY *to the* SOUTH-"*east quarter;*" that "*it did not bind the Government, nor* "*could the Government take advantage of it, being a* "*stranger to the estoppel;*" "*nor did it re-invest the Gov-*"*ernment with the title to the* NORTH-*east quarter.*" 17 Wall., 40. The only difference between the case as then before the court and the present one, is that on the last trial the plaintiff introduced in evidence a so-called patent for the *South*-east quarter, (or, a copy of the recorded grant), to some man named "Giles Egerton," (whether the same "Giles Egerton" to whom the *North*-east quarter was patented, does not appear.) This does not change the proposition asserted in the opinion of this court referred to, that the "estoppel related *only* to the *South*-east "quarter."

(2.) The court expressly hold that "we must distinguish "between those claiming under the deed to Hart," * * "and those claiming as grantees of the *North*-east quarter," and that the estoppel, if any, as to the *South*-east quarter, cannot be enlarged so as to embrace the *North*-east.

Speaking of even the *South*-east quarter, the opinion remarks:

"*But the government is not the grantee of that quarter* "*under or through Hart. The Government is still, in law,* "*a stranger to the estoppel.*" (*Ib.*, p. 41.)

(3.) Your Honors also hold that even if there is any estoppel, it is an "*equitable*," and "not a *legal* one, and "therefore *not available in an action of ejectment when the* "*title is at issue.*" (*Ib.*, 41,42.)

(4.) The court also suggest, that, even had the Government filed a bill in equity against Egerton, "it would "perhaps have been a good defense for him to have shown

" that the discrepancy in his deed was a mere mistake, and " that *the agents of the Government had no right to rely* " *on it, because* THEIR OWN RECORDS would *have shown that* " *the* patent was in fact given for *the* NORTH-*east quarter.*" (p. 42.)

(5.) This court also hold that Egerton's grantee, in what he did under the act of Congress, or otherwise, " could only bind Egerton *to the extent of Egerton's deed*;" and the opinion adds that:

" *Egerton never asked the government for another patent, nor did he authorize his grantee to do so. The transaction which took place between that grantee and the government was*, as to Egerton and his grantees, of the lot in question, *res inter alios acta.*" (17 Wall., 43.)

IV. EFFECT OF THE RECORDED GRANT AND LAND WARRANT LOCATION.

Mr. Justice BRADLEY incidentally remarks in the opinion, (page 43), that " had the patent itself been exhibited on the " trial, it would have ended all controversy on the subject," of " the truth of the case, as to which quarter-section was " actually granted to Giles Egerton by his patent of January " 10, 1818." And, inasmuch as plaintiff in error produced on the last trial *a* patent to a man of the *name* of " Giles " Egerton," for the *South*-east quarter, opposing counsel hangs his hopes of recovery on what was thus incidentally said in argument.

But I may safely venture the assertion that neither the distinguished justice, nor this court, ever intended to be understood as holding that the instrument (so-called patent) issued or delivered to Egerton, (even if he be the same Egerton to whom the recorded grant was made), is of more gravity and to *out-weigh not only the solemn record of the government, but also the undisputed land-warrant location.* This were to hold that the *mistake of the scrivener*, in

writing the word "South," instead of "North," is to have more weight, in "showing *the truth* of the case," *than both the solemn grant of record and the unquestioned land-warrant location*; and this, too, notwithstanding there is *no record of any grant* of the *South*-east quarter to Egerton. The *mistake* or *willful wrong-doing* of a scrivener, can hardly be magnified into more consequence than all the deliberate acts of the government, under the solemn forms of law, and also as working the defeat of Egerton's individual efforts to secure a particular tract.

V. The Recorded Grant.

(1.) Exemplifications of patents are of equal validity with the original copy of the grant delivered. 1 Brightly, 463, cl. 9; 461, cl. 26; 465, cl. 27; 21 How., 175; 5 Peters, 239; 1 Black, 554–5.

In the case last cited, this court remarks that:

"In every well regulated government the deeds of its officers, conveying parts of the public domain, are registered or *enrolled to furnish permanent evidence to its grantees of the origin of the title.* An exemplification of such record is admissable as *evidence of the same dignity* as of the grant itself." See also 15 How., 1.

(2.) Even if it be conceded that the "Giles Egerton," to whom the so-called "patent" for the *south*east quarter was issued, is the *same* "Giles Egerton" who located the warrant on the *north*-east 18, and to whom the *recorded grant* runs, and that a *mistake* was made in the supposed copy, or so-called "patent" issued to him, yet that *mistake* could not alter "the *truth* of the case," that the grant was *really* for the *north*-east quarter, nor the further "*truth*" that the warrant was located on the latter quarter, *which was thus withdrawn from the power of all the officers and departments of the government combined.*

(3.) A patent "*is not deemed a grant until the proper* "*record is made.*" *U. S.* v. *Vallejo*, 1 Black, 555.

(4.) There was *no record* of the so-called patent to Giles Egerton for the *south*-east quarter. The *mistake* (if there was one) could very easily have been solved by reference to the *record* at Washington.

All mistakes made " or *doubts arising upon the* COPIES *that may be delivered are solved by reference to the protocol* from which the *copies* are taken, *and without which they have no authority.*" (1 Black, 155; *id.*, 298; *id.*, 251; 21 How., 347, 349; 23 *id.*, 273; 21 *id.*, 175.

(5.) Decisions made by this Court, based upon the laws of Mexico, as to the recording of patents, are in point, for their rules in this regard are substantially the same as ours. (See Mexican regulations as to such records, in 1 Black, 550, 552.)

(6.) In *U. S.* v. *Vallejo*, 1 Black, 555, this court, in declaring that a patent "*is not deemed a grant until the proper* "*record is made*," state that,

"Without this safeguard, *the officers making the grant* * * *would be enabled* * * *to dispose of the public domain at will*, leaving the government without the means of information on the subject, until the grant is produced from the pocket of the grantee."

(7.) A naked grant of land by government officers is *void*. (1 Black, 550; *id.*, 298; 24 How., 346.)

(8.) A patent is the "record of the government of the existence and validity of the grant." (*Teschemacher* v. *Thompson*, 18 Cal., 26.)

(9.) "It is in the effect of *the patent as a record of the government* that its security and protection chiefly lie." (3 Wall., 492, 493.)

(10.) "The patent is but *evidence of a grant*." (*U. S.* v. *Stone*, 2 Wall., 535; 18 Cal., 27; 1 Cranch., 162.)

(11.) And the *record* is the highest evidence of the *fact of a grant*.

A grant of public lands "*must be found in the proper*

public office, among the public archives: THIS IS THE HIGHEST AND BEST EVIDENCE." (*U. S.* v. *Castro*, 24 How., 350.)

(12.) A patent, granting land, takes effect *at its execution*, no matter whether delivered or not. (4 Gilm. (Ill.), 173–4; 1 Cranch., 156, 162, 167.)

VI. The Recorded Grant Not Canceled or set aside.

(1.) "No officer of the land office is competent to cancel or annul the acts of his predecessor. This is a *judicial* act, and requires the judgment of a court." (*U. S.* v. *Stone*, 2 Wall., 535.)

(2.) A patent is the highest evidence of title, *and is conclusive against the government and all claiming under junior patents or titles*, until it is set aside or annulled by some *judicial* tribunal. (*Ibid.*)

(3.) A patent of land can be *impeached or avoided* only when issued *without authority*, and only by decree in a Federal Court, not in an action at law, or any collateral action. 13 Peters, 136; 11 Wheat., 331, 334; 9 Cranch., 989; 18 How., 87; 17 Barb., 599; 8 id., 285–7; 6 Cow., 281; 5 Denio, 389, 398; 10 Johns., 23; 12 Johns., 77; 35 Mo., 69, 70; 5 Minn., 223, 237; 3 Peters, 340, 341; 6 Peters, 342; 29 Cal., 309; 14 Ill., 547, 548; 16 Ill., 557; 1 Scam., 167; Id., 353; 2 Gilm., 598.

(4.) Mr. Chief Justice Marshall, in *Stringer et al.* v. *Lessees of Young et al.*, 3 Peters, 340, 341, in speaking of a land patent, says:

"*No case has shown that it may be impeached at law* unless it be for fraud; not legal and technical, but active and positive fraud, in fact, committed by the person who obtained it, and even this is questioned."

VII. Location of Egerton's Land Warrant and its Effect.

The location of Giles Egerton's land warrant on the *north*-east of 18, January 10th, 1818, had the effect to appropriate the land and reserve it from future sale, and also to show a right in Egerton that could have been enforced, even before the patent was executed. There never has been any attempt to cancel the location. When the location was made the power of the land office over the land was at an end. The subsequent patent to Leonard was therefore *void*, and would be so even had no grant of the land been made to Egerton. But the location and recorded grant are to be taken together, as one title, the location operating *in aid of the patent*.

(1.) By the warrant and location, the soldier acquired an absolute right to the land and to a patent. Act of May 6, 1812, 2 Stat. at Large, 720, §§ 2, 3; Act of Dec. 24, 1811, ib., 669, § 2; Act of Jan. 11, 1812, ib., 672, § 12.

(2.) The Illinois Military Tract (in which the land is located), was set apart for soldiers' bounties. (Act of May 6, 1812, 2 Stat. at Large, p. 728, § 1.)

(3.) "A patent by the United States, executed in pursuance of a location and warrant, is evidence that the right of possession acquired by the location of the warrant had ripened into a perfect title, even though executed after suit brought." (22 Cal., 480; 31 ib., 264.)

(4.) "*When a land certificate has been located, the power of the Land Office over the land is at an end, and a subsequent patent of the same land must yield to the certificate and location*, though the patentee had no notice of it." 1 Smith, (Ind.,) 211.

(5.) The patent is *evidence* of the interest held by the grantee *under his prior grant or location*. 18 Cal., 27.

(6.) "And this court has held that a right to a patent, *once vested*, is equivalent, as respects the Government's

dealing with public lands, to a patent issued." 6 Wall., 402, 410, 413, 417, 418; 2 How., 344.

This rule is available, even to strangers to the transaction. 10 How., 372–3; 3 Wall., 491.

(7.) "Where there are divers acts concurrent to make a conveyance estate or other thing, the *original act* shall *be preferred:* and to this the other act shall have relation." 10 How., 372. Viners' Abr., Tit. "Relation," 290.

(8.) Egerton's right in the land in controversy, on the location of his warrant, and before patent executed, could have been sold on execution against him, and the patent subsequently executed would have enured to the benefit of the purchaser under the execution sale. R. S. (Ill.,) 1845, pp. 300, 301, §§ 1, 3; Gross' Stat., Ill., 1871, 378, 379; §§ 1–3; 10 How., 348, 372.

(9.) Where land has been regularly entered, *and the Land Office canceled its entry and issued a patent to a third person* for the same land, *the patent and cancellation of the entry are both void.* 1 Black, 132; 18 How., 88.

(10.) A land warrant location being had, and certificate granted, a subsequent sale of the same land is *void*, although made to a *bona fide* purchaser without notice. 1 Carter, (Ind.,) 339.

(11.) A purchaser who has done all the law requires to entitle him to a patent, cannot be affected by ignorance, negligence, or want of fidelity on the part of the Government or its officers. 23 Miss., (1 Cush.,) 383.

(12.) By the location of the land warrant, *the locator acquires a vested legal right*, protected by the constitutional guaranties of the right of property. 7 Texas, 259.

(13.) A tract of land, once appropriated, from that moment "*becomes severed from the mass of public lands, and no subsequent law or proclamation or sale would be construed to embrace it, or operate upon it.*" 13 Peters, 513.

(14.) *A patent for land is conclusive only as against "those whose rights did not commence previous to its emanation.*" 7 Wheat., 312.

(15.) When the pre-requisites "prescribed by law for "the acquisition of title," "have been complied with," the party so complying "*acquires a vested interest in the "premises, of which he cannot be subsequently deprived.*" 15 Wall., 77–8; 1 Otto, 330, 338.

(16.) For the same doctrine strongly stated, see 3 McLean, 109; 1 Smith, (Ind.,) 211.

(17.) "*Patents by the United States for and which it has previously granted, reserved from sale, or appropriated, are void.* 6 Wall., 165.

This is so held *even at law.* Ibid., 33 Ill., 437.

VIII. THE PATENT AND LOCATION MUST BE TAKEN TOGETHER.

(1.) "Where there are divers acts concurrent to make a conveyance estate or other thing, the original act shall be preferred, and to this the other act shall have relation." 10 How., 438; 3 Cow., 75; 12 Mo., 145; Cruise on R. P., vol. 5, 510–11.

(2.) This "doctrine of relation" is reaffirmed in *Beard* v. *Federy*, 3 Wal., 491. See also, 18 Cal., 27.

(3.) In 13 Peters, 450, 451, this court remarked:

"In 1 Peters, 662, (*Ross* v. *Barland*,) it was held that the entry and junior patent could be given in evidence in connection *as one title*, so as to overreach the elder patent. The practice of giving in evidence a *special entry in aid of a patent*, and dating the legal title from the date of the entry, is familiar in some States."

IX. LAST PATENT VOID. FORMER LOCATION AND PATENT CONCLUSIVE ON THE GOVERNMENT AND ALL CLAIMANTS, EVEN AT LAW.

(1.) *Patents by the U. S. for lands previously granted, or reserved from sale or appropriated, are* VOID. 6 Wall., 160; 1 ib., 535, 537; 2 How., 317, 318.

(2.) "This is a question as well examinable at law as in chancery." 2 How., 315.

(3.) *When the State has no title to the thing granted,* or the officer has no authority to issue the grant, the acts of the State officer are absolutely *void*, and are necessarily examinable at law. 2 How., 581; 13 Peters, 498; 11 Wheat., 380; 9 Cranch, 87, 89; 6 Peters, 691; 18 How., 87; 6 Peters, 328; 8 Barb., 253; 6 Cow., 281; 16 Johns., 23–4.

(4.) As against the Government, and parties claiming under the Government by title subsequent, the land warrant location and the record of the grant are *conclusive.* 3 Wall., 478, 492.

(5.) Same doctrine held in California. 15 Cal., 361; ib., 533; 18 Cal., 11, 25.

(6.) And it is held in California that:

"Even in actions at law, where there are conflicting patents for the same land, *a court will go behind the patents to ascertain which party has the prior right.*" 42 Cal., 606, 615; 34 Cal., 506. See also, 1 Peters, 664.

(7.) A Patent "issued unadvisedly or by mistake, when "the officer has no authority in law to grant it," "*and* "*when another party has a higher equity*, and should "have received the patent," will be declared *void, even in courts of law.* 2 Wall., 535.

(8.) A patent issued for lands reserved from sale is *void.* 11 Mo., 589.

(9.) A new grant of land already granted, is a mere nullity. 5 Richardson, (S. C.,) 267; 10 Johns., 23.

(10.) When the United States has no title, the grant is *void*, and is *examinable at law.* 9 Cranch, 99.

(11.) Testimony, showing a want of *power* in officers who issue a patent, is admissible in an action *at law* to de-

feat a title set up under it. In such case, the patent is absolutely *void*. *Sherman* v. *Buick*, 3 Otto, 209.

(12.) The doctrine of estoppel applies to a State as well as private persons. When a State grants lands and thus parts with its interest therein, it is estopped from claiming afterwards any right thereto. 2 Paine, C. C., 545, 546, 547-8; 10 Mass., 145.

X. No presumption that there were not two soldiers named Giles Egerton in the same company, to whom the two quarters were conveyed.

In the case *Montag* v. *Linn*, 23 Ill., 551, under circumstances analogous to those of the present case, in which one "John Silver," a soldier "in McIntosh's Light "Artillery," was concerned, when a deed was introduced describing the land by its numbers, and as "the same "land granted to John Silver," by patent, from the Government, etc., it was held that, "striking out the description "of the land by its numbers, then the *onus* is on the party "claiming under it to show affirmatively that there was "but one John Silver to whom land was granted by the "Government for military services, and then identify that "as the land in controversy."

XI. The double description.

The deed from Egerton to Hart describes the land as the "*south*-east quarter of Section 18," etc., which "quarter "section was granted to the said Giles in consideration of "his military services, as will appear by a patent obtained "from the General Government, dated the 10th day of "January, 1818." There being a double description, one of which is incorrect, the correct description will prevail. The recorded grant (if not by itself, certainly as

aided by the land warrant location), shows the correct description.

(1.) A mis-description by numbers in a deed may be corrected by reference to a general description therein, and the mis-description will be rejected as surplusage. The law not only allows but requires this to be done. 5 N. H., 408; 4 Mass., 196; 33 Me., 204; 6 Cow., 281; 4 Crokes Charles, 447, 473; 19 Johns. R., 499; 18 Johns. R., 81; 3 Peters, 344; 38 Mo., 510; 18 Ill., 206; 23 Ill., 557; 24 Ill., 67, 74; 5 Metc., 15.

(2.) "Any description adopted by a deed by which the premises intended to be conveyed may be established and identified, is sufficient; and for the purpose of sustaining the grant *extrinsic evidence may always be used* to identify and establish the objects of the call in the deed." 67 Ill., 583; and large number of cases cited; 80 Ill., 269.

XII. The Tax title and Possession thereunder.

The defendants in error acquired a tax title under a judgment and sale for the taxes of 1839, and they and their grantors were in possession of the quarter in controversy over 25 years before the commencement of this suit, having paid all the taxes and assessments thereon from 1844 to 1868, inclusive.

(1.) The land was liable to taxation as soon as the warrant was located thereon, and remained so liable regardless of any question as to the legal title having passed by the grant. The location of the land warrant created at least an inchoate title; and "an inchoate title to lands "is property." 9 Peters, 133.

(2.) "All property, personal and real," with certain exceptions, is, and was in 1839, liable to taxation in Illinois. Ill. Rev. Stat. 1845, p. 436, § 1.

(2.) "Lands entered or *located* are liable to be taxed as "well before patent is issued by the United States, as

"after;" "and also are liable to sale for non-payment of "taxes." 3 McLean, 107, 110; 3 How., 441, 460, 461; 4 McLean, 25; 4 Wall., 210; 16 Wall., 603, 606; 22 Wall., 446, 461; 15 Ohio, 367, 370; 7 Ohio, 176; 3 Cal., 645, 647–8; 24 Ohio St. R., 439, 445; 2 Ohio, 556; 26 Ark., 54.

(4.) And so, lands entered or *located*, even though patent is not issued, are also "subject to seizure and sale "by execution." 10 How., 372–3.

(5.) "Such being the law, no acts or transactions by "individuals can operate in any way to prevent or bar the "right of taxation in this State;" under which taxation the defendants in error acquired their rights. They are protected against any title or right in any other party, under the Limitation Laws of both seven and twenty years. R. S. Ill. 1845, 104, § 8; id., 349, § 7; 26 Ill., 520; 17 Ill., 501; 14 Ill., 159; 34 Ill., 478; 55 Ill., 325; 43 Ill., 391; 13 Ill., 192; 15 Ill., 273, 274; 45 Ill., 388.

IV.

ARGUMENT.

When this case was before this Court, at the December term, 1872, your honors determined that there was no estoppel by which the then plaintiffs (now defendants), in error could be charged. *Branson* v. *Wirth*, 17 Wall., 32, 40, *et seq.*

The question of estoppel (upon which alone counsel for the then defendant in error relied), being disposed of, the court did not consider it important to determine other points raised on behalf of the then plaintiffs in error, and which now again are urged by the present defendants in error.

I. The Supposed Estoppel.

The opinion of this Court in the case, as it stood when here before, would seem to have settled forever the question of estoppel, then and now again insisted upon by counsel for Wirth, against the view urged on behalf of the present plaintiff in error.

But, before considering that opinion, I beg to recall certain facts of the case, and some general principles of the law of estoppel, which may serve to give all the more point to what is said in the matter by this Court, in the opinion referred to.

I recall, then, the following facts: *First:* Hart never conveyed or attempted to convey, the *north*-east quarter; *Second;* the *mesne* conveyances down into Shaw, are for the *south*-east quarter *only*. *Third:* the Act of Congress only authorized the "*legal* representative or *assignee* of Giles "Egerton," to enter another tract "in lieu of the quarter "patented to said Giles," etc., "which had been previously "patented to James Durney"— that is, "in lieu of" the *south*-east quarter. *Fourth;* no conveyance *to Shaw* of the *south*-east quarter *was ever recorded:* and there is no proof that Leonard knew or had ever heard of that deed when he got his junior patent. *Fifth:* neither the *north*-east nor the *south*-east quarter was ever re-conveyed to the United States, either by Shaw or any one else.

Then, no *legal title* having passed out of Hart for the land in controversy, and the "*legal* assignee" of Egerton never having taken advantage of the Act of Congress, the whole basis of the supposed estoppel vanishes to the winds. And there is no estoppel *in equity*, even, not only for the reason just indicated, but also because the proofs fail to show that there was not a second sergeant Giles Egerton; from which negative circumstance, (if it existed,) and from which alone, the inference might be drawn that it was in-

tended to pass the title shown to have been patented to *a* Giles Egerton down to Shaw by the *mesne* conveyances; and because, also, neither the plaintiff in error, nor his grantor, is shown to have had knowledge or notice that any equities that may have been in Clemson, (if any), had been conveyed to Shaw. And this being the case, the plaintiff in error stands in no privity, through the junior patent, with any equities that might be imagined in the case. He is not in the most remote privity with the Egerton to whom the land in controversy was patented.

1. No person can rely upon an estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. Mutuality is a requisite to all estoppels. *Deery* v. *Cray*, 5 Wallace, 795; *Nutzell* v. *Tounguc's Lessee*, 22 Md., 419; *Williams* v. *Candler*, 25 Texas, (Walker,) 4; *Bernal* v. *Lynch*, 9 Wall., 313.

2. "It is clear that a stranger cannot be bound by, nor take an advantage of an estoppel. An estoppel to be binding must be reciprocal, and parties and privies only are bound thereby." *Robinson* v. *Bates*, 3 Metc., 40.

See also *Kitzmiller* v. *VanRensselaer*, 10 Ohio St. R., 63; *Harrison* v. *Gray*, 49 Maine, 537; *Stinson* v. *Sumner*, 9 Mass., 143; and especially *Dearborn* v. *Taylor*, 10 N. H., 153.

3. An estoppel "only arises in suits founded upon the instrument which contains the recital or growing out of the transaction in which it is given, and not in other or collateral controversies, even between the same parties." 4 Texas, 11, and cases cited.

4. The doctrine of estoppel is only available to the party for whom it was designed, and not for a stranger, to whom the representation on which it is based was not made. *N. Y., etc., R. R. Co.* v. *Schuyler*, 38 Barb., 534.

5. As understood and applied in modern times there is nothing harsh or unjust in the law of estoppel. It can be used only to subserve the cause of justice and right. *Buckingham* v. *Hanna*, 2 Ohio, (N. S.), 551.

It may be inquired, right here, how "the cause of justice "and right" can be subserved by allowing a land plunderer, at an outlay of $200, to rob the hard-working settlers of 25 years of property worth $10,000? And this, too, when such settlers have been in full possession all that 25 years and over, under a tax-title deed, and which was recorded nearly 24 years of the time, thus giving notice to the world of their title by record, as well as by possession? And this, too, moreover, when neither the junior patentee, nor his grantee, are proven to have been misled by any supposed matter *in pais?* For let it be remembered again, that Clemson's deed to Shaw was never recorded; and the first time it figured in this case was when it was introduced in evidence on the first trial below.

6. An equitable estoppel never takes place, unless the party seeking to avail himself of it has been *actually misled. Jewett* v. *Miller*, 10 N. Y., (6 Selden,) 402, 406; *Brubaker* v. *Okeson*, 36 Penn., 519.

7. The doctrine of estoppel is highly equitable in its nature. 10 N. Y., 407.

8. "*It is essential to an equitable estoppel* by matter *in pais, that he who sets it up should show that he has been misled to his hurt.*" *Brubaker* v. *Okeson*, 30 Penn., 519, 522, and cases cited.

9. There is no estoppel *in pais* unless the party who sets it up has, by the acts or declarations of the other party, been induced to believe the existence of facts inconsistent with the claims of such other party, and acted on such belief. *Lawrence* v. *Brown*, 1 Selden (N. Y.), 394.

10. The very definition of estoppel is when an admission is *intended to lead and does lead* a man with whom a party is dealing into a line of conduct which must be prejudicial to his interests, unless the party estopped be cut off from the power of retraction. So, an estoppel, affecting the right of a party in real estate, may be created by matter *in pais*, consisting of acts and declarations of a person *by which he designedly induces another to alter his position, injuriously to himself.* 3 Hill, 219; *Brown* v. *Wheeler*, 17 Conn., 345; *Kinney* v. *Farnsworth*, Id., 355.

11. There must be a willful intention to mislead, or at least such conduct as to *deceive* a *reasonable* man to his prejudice, in order to create an estoppel. And "by the term *willful*, it must be understood, if not that the party represents that to be true which he knows to be untrue, at least *that he means his representation to be acted upon*, and that it is acted upon accordingly." *Freeman* v. *Cook*, 2 Wells. H. & G., 653.

12. "An equitable estoppel will be created when a person, by his acts or declarations, *designedly induces* another to alter his position injuriously to himself. *It only arises when the conduct of the party estopped is fraudulent in its purpose, or injurious in its results.*" *Williams* v. *Chandler*, 4 Texas, 11.

Now, tested by these rules, how can there be any estoppel in this case, even in equity? The defendants in error are in no way connected with any matter *in pais* that is set up by way of estoppel. They have acquired the title to the land in controversy (the North East quarter) that was in Egerton and Hart, through the judgment of 1840, and deed of 1843 thereunder, for taxes, or, rather, have barred that title by limitation, through occupancy and payment of taxes under "claim and color of title," as I shall demonstrate hereafter; and this is the only way they are proven to be connected with Egerton's or Hart's interest. Then, of what matter *in pais* had *they* been guilty, which can work an estoppel in favor of the land shark Leonard, or his grantee?

If it be said that we are setting up the elder outstanding patent title, and hence must stand in the shoes of the supposed holder of that title, so far as the same is in question, I reply that even if Hart had been defendant below, he would not have been estopped from setting up such elder patent title under the rules above laid down. What did Hart do, or leave undone, to *mislead* this *innocent* land-shark, who wants his $200 to swell into $10,000, by means of this law suit? He (Hart) made no attempt to convey

the land in controversy. He deeded only the *south*-east quarter. And wherein has Leonard, or his figure-head plaintiff, shown that, by Hart's conveyance of the *south*-east quarter, he was *misled* into the idea that the *title* to the *north*-east swung back into the government, and therefore he was induced to act and "alter his position" to the tune of $200, in obtaining the junior patent, in the hope of pocketing $10,000 thereby?

If it be answered that Hart intended to convey whatever title he acquired of Egerton, and supposed he had done so by his deed for the *south*-east, and that the equitable title for the *north*-east quarter thereby passed, I reply that that is a *non sequitur*, because it depends upon whether or not there was a second Giles Egerton to whom a patent had issued by mistake, for the land "previously patented to "James Durney"; and secondly, I reply that "a party is "is not estopped by his admission or assertion of a con-"clusion of law" (*Brewster* v. *Striker*, 2 Comst., 19), so that even if Hart had intended to convey as indicated, or had even represented that his conveyance was for the *north*-east, it would have been a mistake as to the legal effect or "conclusion of law" in respect to what he really had done; hence, he would not have been estopped.

Neither would Hart have been estopped, for the further reason already suggested, that the "*legal* assignee" of Egerton never entered any tract under the act of Congress, and the junior patentee, Leonard, knew, if he knew anything (and he is presumed to know the law), that Shaw was *not* such "legal assignee" as to the *north*-east quarter, and had no more right to make an entry under the act, "in lieu" of that quarter, than had Nebuchadnezzar of old. He could not possibly have been misled as to said *north*-east quarter. On the other hand, if he knew of the deed from Clemson to Shaw, he was well

aware that Shaw *was* the "legal assignee" of whatever interest said Hart had in the *south*-east quarter.

13. *The rights which defendants in error acquired under the judgment for taxes*, and by reason of their possession and payment of taxes, will not be overlooked by this court, and *could not have been overlooked by Leonard before he obtained his patent of 1868*, for their possession, apart from their recorded deed, was notice to the word of their claim; and *this court will not permit these rights to be overreached by any mere fiction of law*—certainly not by the doctrine of estoppel, which is based upon the broad foundations of *equity*.

When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights of the possessor, and he cannot set up the want of notice to protect himself. *Brewer* v. *Brewer et al.*, 19 Ala., 481.

The junior patentee "has been misled to his hurt" by nobody—certainly not by defendants in error, *of whose rights and claim the law charges him with full notice*. Nor has he been by anybody "designedly induced to "alter his position, injuriously to himself;" nor yet has there been any "such conduct as to deceive a *reasonable* "man to his prejudice." Such being the case, the plaintiff in error, who takes no greater rights than his grantor possessed, occupies no attitude enabling him to invoke an estoppel, even in equity.

II. ESTOPPEL IN EQUITY. But whatever view may be taken of this question of estoppel, there cannot be *tortured* out of it anything more, at the most, than an estoppel *in equity*. And if *this* is what is claimed, the very claim itself will put an end to the case at bar: for *an estoppel in equity cannot be asserted in a proceeding at law*.

1. "There is no rule of practice better settled than that an equitable title forms no bar to a recovery in ejectment." *Wales et al.* v. *Bogue*, 31 Ill., 468.

2. The *legal title* to land must always prevail in an action of ejectment, and *such title cannot pass by fraudulent representations, or by acts or conduct in pais*, without deed. *Smith* v. *Munday*, 18 Ala., 185.

3. *When circumstances dehors the grant are relied upon to avoid a patent, the grant is voidable only by direct suit for the purpose.* *Jackson* v. *Hart*, 12 John., 77.

4. Estoppels *in pais*, relating to real estate, *cannot be made available in a court of law.* *Flake* v. *Fash*, 44 Ill., 302, 305.

5. An estoppel *in equity* cannot be asserted in a trial *at law.* *Bishop* v. *Blair*, 36 Ala., 80, 86; *Miller* v. *Graves*, 38 Ill., 466, and cases cited.

6. An equity cannot be set up at law, in ejectment. This must be asserted in a court of equity to vest the legal title in the equitable holder. *Williams* v. *Carpenter*, 35 Mo., 70.

7. ☞And now I advance a step further, and insist that even if Hart or Egerton, or both, (in whose shoes, or in the shoes of one of them, it is argued that the defendants in error stand when interposing an outstanding title,) if either or both of *them* had induced Leonard to enter the land in controversy, and procure his junior patent, and even, moreover, if Hart, for instance, had been occupying the place of the defendants, on the trial of this cause, yet nevertheless, even then, the plaintiff below would not have been entitled to recover.

If one, having the *legal title* to land, *induces another to purchase it under execution against him, he is not thereby estopped in a court of law*, from showing that the sale was *void*, and passed nothing to the purchaser. *Smith* v. *Munday*, 18 Ala., 182; *McPherson* v. *Walters*, 16 Ala., 714.

III. HOLDING OF THIS COURT AT THE FORMER HEARING AS TO THE SUPPOSED ESTOPPEL. Your honors,

through Mr. Justice BRADLEY, say, that "the deed given "by Egerton to Hart, in July, 1819, for a lot described as "the *south*-east quarter of section 18, and as granted to "Egerton by his patent of January 10, 1818," * * * "if the patent thus referred to was, in fact, for the *north*-"*east* quarter;" * * "might have been rectified in "equity, or perhaps, by reference to the patent itself; but, "standing as it did, without being reformed," it would "at "most," only technically estop Egerton, "at law, to deny "that his patent covered the south-east quarter, which the "deed, in terms, conveyed;" secondly, "that *this estoppel* "*related* ONLY *to the* SOUTH-*east quarter*;" thirdly, "that it "existed only as between Egerton on the one side, and "Hart on the other, and their respective privies." And the learned Justice proceeds to say that:

"Thus far *it did not bind the government, nor could the government take advantage of it, being a stranger to the estoppel*. It did not impair the title of the government, or of its patentee, to the *south*-east quarter, assumed to be conveyed; *nor did it reinvest the government with the title to the north-east quarter*," etc. *Branson* v. *Wirth*, 17 Wall., 40.

Now, every word of this remains true to-day, even if it be conceded that the so-called "patent," (copy of the grant) delivered to Egerton, by mistake described the land granted as the *south*-east, instead of the *north*-east quarter, of 18. It could "not bind the government, nor could the "government take advantage of it, being a stranger to the "estoppel;" nor could it "impair the title of the govern-"ment, or of its patentee, to the *south*-east quarter;" nor yet could it "reinvest the government with the title to the "*north*-east quarter," which the *recorded grant* (paramount to and of greater solemnity than the paper delivered, usually called the "patent,") shows was invested in Egerton, January 10, 1818; and which *north*-east quarter, aside from the grant of record and from the *evidence* of such

grant delivered to the patentee, was withdrawn from the control and placed beyond the *power* of the government *by Egerton's land-warrant location thereon, January 10, 1818, concerning which there is no question.* [Record, folios 25–27.]

No mistake or blunder of officers, or others, could reinvest the government with claim to or any control of said *north*-east quarter *after this land-warrant location was had, even if there had been no patent whatever for the same;* nor could any transaction *inter alios acta*, and especially with respect to *another* and different tract, so reinvest the government.

Having premised that, "in speaking of the grantees of "Egerton, we must distinguish between those claiming "under the deed to Hart, which assumed to convey the "*south*-east quarter, and those claiming (as the defendants "do,) as grantees of the *north*-east quarter," your honors proceed to discuss the effect of the private act of Congress, procured in 1827, and of the entry of a tract of land by Shaw, in 1838, under the same, and, in doing so remark as follows:

"The act in question was made for the benefit of the grantee under Hart's deed. He claimed the *south*-east quarter, but found that it had been patented to Durney; and he applied for leave to enter another lot. *How can his act change or enlarge the estoppel by which Egerton and his grantees of the lot in question were bound before?* A person entitled to the benefit of an estoppel may transfer it by transferring the estate, but *he cannot change it or enlarge it. Every grantee of the south-east quarter*, through Hart, to the end of time, may estop Egerton and his assigns from denying that his patent was for the *south*-east quarter. BUT THE GOVERNMENT IS NOT A GRANTEE OF THAT QUARTER UNDER OR THROUGH HART. THE GOVERNMENT IS STILL, IN LAW, A STRANGER TO THE ESTOPPEL." *Ibid* p. 41.

Nor is there any pretense that the government is a grantee of the *north*-east quarter, and so "the government

" is still, in law," equally " a stranger " to any assumed estoppel as to *that* quarter as well.

Again, the opinion says:

" It is supposed that Egerton and his assigns are estopped by the fact that the government was induced to give to Egerton's grantee another lot in consequence of the declaration in his deed to Hart. This may be ground for an *equitable* estoppel not a *legal* one, and therefore *not available in an action in ejectment where the title is at issue.*" *Ibid.*, pp. 41–2.

And upon this principle I maintain, and have all along maintained, that under no possible view of the case at bar, can a recovery be had in the pending proceedings.

The opinion thereupon proceeds to state that:

" Had the government after granting another lot to Egerton's grantee, in pursuance of the act of Congress, filed a bill against Egerton to prevent him from asserting title to the lot in question, perhaps it would have been a good defense for him to have shown that the discrepancy in his deed was a mere mistake, and that *the agents of the government had no right to rely on it, because* THEIR OWN RECORDS *would have shown that the patent was in fact given for the north-east quarter.* But, however this may be, *the only estoppel arising out of the transaction referred to, which the government could set up, was an equitable, and not a legal one.*" *Ibid.*, p 42.

The court then declare that, even " if the government " *could*, in any aspect of the case, claim the benefit of the " *legal* estoppel, it would be prevented from doing so by " its own patent granted to Egerton. That would present " the case of an estoppel against estoppel, which Lord Coke " says setteth the matter at large. No one can set up an " estoppel against his own grant. Whoever else, there- " fore, might set up the estoppel against Egerton's title to " the lot in question, the government could not do so." * * " And whatever the government could not do, its subse- " quent grantee could not do."

Again, in repelling the suggestion that Egerton's

grantee "represented Egerton, and by his acts bound Eger-" ton in the same manner as himself," the opinion states that:

"*He could only bind Egerton to the extent of Egerton's deed*, and the effect of that has been fully considered. *Egerton never asked the government for another patent, nor did he authorize his grantee to do so. The transaction which took place between that grantee and the government was*, AS TO EGERTON AND HIS GRANTEES OF THE LOT IN QUESTION, *res inter alios acta*." *Ibid.*, (17 Wall.,) 43.

IV. EFFECT OF THE RECORDED GRAND AND LAND-WARRANT LOCATION.

Concluding that "there was no estoppel shown by the "evidence which would prevent the defendants from show-"ing *the truth of the case, as to which quarter-section was* "*actually granted to Giles Egerton by his patent of Jan-*"*uary 10, 1818*," the learned justice who wrote the opinion, proceeds to state, that, "*had the patent itself been* "*exhibited on the trial, it would have ended all controversy* "*on the subject*"—that is, in respect to "the truth of the "case, as to which quarter section was actually granted "to Giles Egerton by his patent of January 10, 1818." (Ibid., p. 43.)

While the opinion does not state, and evidently does not mean to indicate, what *effect* this ending of "all contro-"versy on the subject" of "the truth of the case" would have in this *ejectment* proceeding, still, as the copy or supposed copy of the grant, delivered to the soldier, is evidently referred to, in this connection, as "the patent itself," I must quarrel a little with what seems to me to have been thus inadvertently said.

To my mind, it does not seem *possible* that this court mean to hold that the supposed copy of the recorded grant delivered to the soldier is of more gravity

than and paramount to not only the solemn record of the government but *also the unquestioned land-warrant location!* This were to decide in the present case (if it be conceded that the so-called "patent" for the *south*-east quarter was to the *same* Giles Egerton to whom the record shows the *north*-east quarter was granted,)—in that event, it were to decide that the *mistake of the scrivener*, in writing the word "south" instead of "north," *is to have greater consideration and more weight in "showing the "TRUTH of the case*, as to which quarter-section was ac- "tually granted to Giles Egerton," *than both the grant, as shown by the solemn and deliberate record of the government, and the undisputed land-warrant location on the north-east quarter!* And this, too, notwithstanding the further fact that *there is no pretense of any record of a grant of the* SOUTH-*east quarter to Egerton.* If this be the holding, then the *mistake* or *willful wrong-doing* of a scrivener is to overcome and out-weigh all the deliberate acts of the government in the matter, and defeat the purpose of the land-warrant holder, as well, in his efforts to secure a particular quarter section, by careful location under all the forms of law!

Certainly it cannot be that this court intend so to decide.

V. THE RECORDED GRANT.

1. Exemplifications of patents are of equal validity and force with the original copy of the grant delivered to the patentee.

1 Brightly, 463, cl. 9; 461, cl. 26; 465, cl. 27.
U. S. v. *Sutter*, 21 Howard, 175.
Patterson v. *Wynn*, 5 Peters, 239, 240, etc.
U. S. v. *Vallejo*, 1 Black, 554–5.

In the case last above cited this court remarks that: "It is well said in *The United States* v. *Sutter*, (21 How-

" ard, 175), that 'in every well regulated government the " ' deeds of its officers, conveying parts of the public do- " ' main, are registered or enrolled *to furnish permanent* " ' *evidence to its grantees of the origin of the title.*' An " exemplification of such a record is admissible as evidence " of *the same dignity* as of the grant itself."

5 Peters, 233; 15 Howard, 1.
U. S. v. *Vallejo*, 1 Black, 454–5.

2. Even if it be conceded that the Giles Egerton, to whom was issued the so-called "patent" for the south-east quarter, is the *same* Giles Egerton who located his land warrant on the *north*-east quarter, and to whom the recorded grant of the same quarter runs, and that it is evident, therefore, that a mistake was made in the supposed copy of the patent or grant that was issued to him, so that the land was described therein as the *south*-east quarter, instead of the *north*-east, on which latter the location was had as stated, yet that mistake would not alter the fact that the grant was really for the proper quarter, (namely, the *north*-east), for the simple reason that what is usually called "the patent" (i. e., the copy delivered to the patentee), *is not the grant* at all, but only *evidence of the grant.*

3. A patent "*is not deemed a grant until the proper record is made.*"

U. S. v. *Vallejo*, 1 Black, 555.

4. If there was a mistake as to the land, in what purported to be the copy of the grant, (i. e., "the patent") which was delivered to Egerton, then there was not only *no record* of any such grant as indicated by the instrument delivered, but the mistake could very easily have been resolved by reference to the *record* at Washington. This court has well said, in regard to so-called "patents," that

" All *doubts arising upon the copies* that may be *delivered* " are resolved *by reference to the protocol* from which the

"copies are taken, and *without which they have no au-*
"*thority.*" *U. S.* v. *Vallejo*, 1 Black, 555.

The same doctrine is held in *U. S.* v. *Neleigh*, 1 Black, 298; *U. S.* v. *Knight*, Ibid, 251; *U. S.* v. *Castro, et al.*, 24 How., 347–9; *U. S.* v. *Osio*, 23 Ib., 273, etc.; and in *U. S.* v. *Sutter*, 21 Ib., 175.

5. Substantially the same rules as to recording patents existed by the laws of Mexico, under which several decisions of this court have been made, as prevail under our own laws. See 1 Black, 550, 552. At the latter page, sections 8 and 9 of the Mexican regulations, as to such records, are given. This court has held that, under those regulations, *a paper purporting to be a grant* of public land, *but not registered or recorded* in the proper book, is inconsistent with the known practice of every well-regulated government, which requires that such acts shall be enrolled; and that a false note of the officiating secretary, at the bottom of the grant, that it had been registered, when it had not, can give no validity to such pretended grant.

U. S. v. *Vallejo*, 1 Black, 552–4–5.
U. S. v. *Castro, et al.*, 24 How., 346.

6. In the case in 1 Black referred to (*U. S.* v. *Vallejo*), this court also remarks that—

"We add, it is important, also, that a record should be made of these grants, so that the government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, *are not deemed grants till the proper record is made.*" * *
"Without this safeguard, the officers making the grants, as in the present instance, the Governor and Secretary,

would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee." 1 Black, 555.

7. A naked grant of land by government officers is *void*. *Ibid.*, 550; *U. S.* v. *Veleigh*, *Ibid.*, 298, etc.; *U. S.* v. *Castro*, 24 How., 346.

8. A patent is the "*record* of the Government of the "*existence and validity* of the grant." *Teschemacher* v. *Thompson*, 18 California, 26.

9. "It is in the effect of the patent as *a record of the Government*, that its security and protection chiefly lies." * * "It was intended it should be an instrument of quiet and security to the possessor." *Beard* v. *Federy*, 3 Wallace, 492, 3.

10. "The patent is but *evidence of a grant*." *U. S.* v. *Stone*, 2 Wallace, 535; *Teschemaker* v. *Thompson*, 18 Cal., 27; *Marbury* v. *Madison*, 1 Cranch, 162.

11. And the *record* is the highest *evidence* of a grant.

A grant of public lands "must be found in the proper public office, among the public archives; *this is the highest and best evidence*." *U. S.* v. *Castro*, 24 How., 350.

12. A patent granting land takes effect at its *execution*, no matter whether delivered or not. *Hulick* v. *Scovil*, 4 Gilm., 173, 4; *Marbury* v. *Madison*, 1 Cranch, 156, 162, 167.

It follows from the foregoing considerations that even if the Egerton named in the recorded grant be the *same* Egerton to whom the so-called "patent" was issued for the wrong quarter, yet the grant to him of the right quarter (*north*-east 18) was complete, and the title vested accordingly; and, moreover, that such instrument, so issued to said Egerton for the *south*-east (the wrong) quarter, was, for all purposes, simply *void*.

VI. The Recorded Grant not Canceled or set aside.

If it be argued that, in issuing the patent of 1868 to Leonard, the government officers treated the patent of 1818 to Egerton as canceled, I reply that, apart from the judiciary, all the officers of the government combined are and were devoid of authority to cancel, or treat as canceled, such senior patent. A patent cannot be set aside or annuled except by a *judicial tribunal*. The officer who issues a patent acts ministerially and not judicially.

(1.) "No officer of the Land Office is competent to cancel or annul the acts of his predecessor. This is a *judicial* act, and requires the judgment of a court." *U. S.* v. *Stone*, 2 Wallace, 535.

(2.) "A patent is the highest evidence of title, *and is conclusive against the government and all claiming under junior patents or titles*, until it is set aside or annulled by some *judicial* tribunal." *Ibid.*

(3.) A patent issued by the United States, regular on its face, can be *impeached* or *avoided*, if at all, only when issued without authority, and *only* by a decree in a Federal Court; *not in an action at law* or any *collateral* action, but upon a bill in equity or *scire facias* instituted *directly for that purpose*, setting forth the grounds for avoiding the same. *Baysnell* v. *Broderick*, 13 Peters, 436; *Patterson* v. *Wilson*, 11 Wheat., 381–4; *Polk's Lessees* v. *Wendall*, 9 Cranch, 98–9; *McCready et al.* v. *Goldsmith et al.*, 18 How., 87; *Parmelee* v. *O. & S. R. R. Co.*, 7 Barb., 599; *People* v. *Livingston*, 8 Barb., 285–7; *Jackson* v. *Marsh*, 6 Cowen, 281; *People* v. *Morrow*, 5 Denio, 389, 398; *Jackson* v. *Laxton*, 10 Johns., 23; *Jackson* v. *Hart*, 12 John., 77; *Williams* v. *Carpenter*, 35 Mo., 69, 70; *State* v. *Bachelder*, 5 Minn., 223, 237, &c.; *Stringer et al.* v. *Lessees of Young et al.*, 3 Peters, 340–1; *Boardman et al.* v. *Reed's Lessees*, 6 Peters, 342; *Hagar* v. *Lucas*, 29 Cal., 309; *Gray* v. *McConnor*, 14 Ill., 347–8; *McGee et al.* v. *Wright*, 16 Ill., 557; *Brunet* v. *Manlove*, 1 Scam, 161; *McConnell* v. *Wilcox*, *Ibid.* 353; *Bennett* v. *Frazer*, 2 Gill., 598.

A few of the authorities last referred to bear upon the

want of authority in the State courts to impeach or avoid patents.

(4.) Mr. Chief Justice MARSHALL, in delivering the opinion of this court in *Stringer et al.* v. *Lessees of Young et al.*, 3 Peters, 340, 341, says:

"The patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures which ought to precede it, is made in a trial at law. *No case has shown that it may be impeached at law*, unless it be for fraud: not legal and technical, but actual and positive fraud in fact, committed by the person who obtained it; *and even this is questioned.*"

VII. LOCATION OF EGERTON'S LAND WARRANT, AND ITS EFFECT.

The location of Giles Egerton's Land-Warrant on the *north*-east 18, in controversy, January 10, 1818, had the effect to appropriate the land, and reserve it from future sale, and also to establish a right in Egerton that could have been enforced even before the patent was executed. There never has been any attempt to cancel this location, whatever may have been the effort to tamper with the record of the grant. Not only so, but after the location the power of the Land Office over the land, as against Egerton's right, was at an end. The subsequent patent to Edward F. Leonard, (grantor of plaintiff in error), therefore was and is *void;* and this would be the case even had no patent been executed pursuant to the location. But as the case stands, the location and the patent are to be taken together as one title, the location of the warrant operating *in aid of the patent*, and the two (location and patent), constituting a perfect title, under the doctrine of relation. Hence the reason becomes all the stronger why the younger patent is void, and must perish.

(1.) By virtue of the warrant and location, the soldier

acquired an absolute right to the land and to a patent. Act of May 6, 1812, 2 Stat. at Large, 729, §§ 2 and 3; Act of Dec. 24, 1811, *Ibid.* 669, § 2; Act Jany. 11, 1812, *Ibid.*, 672, § 12.

(2.) The Illinois Military Tract (in which the land in controversy is located), was set apart for soldiers' bounties. Act May 6, 1812, 2 Stat. at Large, 728, § 1, &c.

(3.) The location of a military land warrant establishes a right of possession on which ejectment may be maintained. *A patent by the United States, executed in pursuance of the location of the warrant, is evidence that the right of possession acquired by the location of the warrant had ripened into a perfect title*, even though executed after suit brought. *Gallup* v. *Armstrong*, 22 Cal., 480; *Butterfield* v. *Cent. Pacific R. R. Co.*, 31 Cal., 264.

(4.) *Where a land certificate has been located, the power of the Land Office over the land is at an end*, and *a subsequent patent of the same land must yield to the certificate and location*, though the patentee had no notice of it. *Moyer* v. *McCullough*, 1 Smith, (Ind.), 211.

(5.) The patent is *evidence* of the interest held by the grantee under his *prior grant or location*, &c., and that the premises were then subject to appropriation in satisfaction of the claim, &c. *Teschemaker* v. *Thompson*, 18 Cal., 27.

(6.) And this court has held that *a right to a patent once vested is equivalent*, as respects the government dealings with public lands, *to a patent issued*: and that when issued, the patent relates back to the inception of the right of the patentee. *Stark* v. *Starrs*, 6 Wallace, 402, 410, 413, 417–18, &c.; *Grignors' Lessees* v. *Astor*, 2 How., 344.

This rule is available even to strangers to the transaction. 10 Howard, 372–3; 3 Wallace, 491.

(7.) "Where there are divers acts concurrent to make "a conveyance estate, or other thing, *the original act shall* "*be preferred*; and to this the other acts shall have rela-

tion." *Landes* v. *Brant*, 10 How., 372; Viner's Abr., title Relation, 290.

(8.) The right of Egerton to the land in controversy on the location of his warrant, and before patent executed, was so far vested, and was so far property, that it could have been sold on execution against him, and the patent subsequently executed would have enured to the benefit of the purchaser under the execution sale. R. S., 1845, of Ill., pp. 300, 301, §§ 1, 3; Gross' Stat. Ill. (1871), 378, 379, §§ 1, 3; *Landes* v. *Brant*, 10 How., 348, 372, &c.

(9.) Where a person has regularly entered land, *and the Land Office canceled his entry and issued a patent to a third person* for the same land, *the patent and cancellation of the entry are both void.* *O'Brien* v. *Perry*, 1 Black, 132; *Minter* v. *Crommelin*, 18 How., 88.

(10.) If the register of a land office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is *void*, although made to a *bona fide* purchaser without notice. *Moyer* v. *McCullough*, 1 Carter (Ind.) 339.

(11.) A purchaser, who has done all that the law requires to entitle him to a patent for a tract of land, can not be affected by ignorance, negligence, or want of fidelity, on the part of the government or its officers. *Nelson* v. *Sims*, 23 Miss. (1 Cush.) 383.

(12.) By virtue of a location of a genuine head-right, the locator acquires a vested legal right, protected by the constitutional guarantees of the right of property. *Howard* v. *Perry*, 7 Texas, 259.

(13.) "*Whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it,* although no reservation were made of it." *Wilcox* v. *Jackson*, 13 Peters, 513.

(14.) In any case *a patent for land is conclusive only as against "those whose rights did not commence previous to its emanation."* *Hoofnagler* v. *Anderson*, 7 Wheat., 212; opinion by Ch. J. MARSHALL.

(15.) In the Yosemite Valley case, 15 Wall., 77–8, Mr. Justice FIELD says, that "the power of regulation and "disposition over the lands of the United States conferred "upon Congress *ceases, when, by the proper course pres-* "*cribed by its laws for the acquisition of title, including the* "*payment of the price of the land, has been performed by* "*the settler.*" And the learned Justice adds:

"When these prerequisites have been complied with, the settler for the first time *acquires a vested interest in the premises* occupied by him *of which he cannot be subsequently deprived.*"

The same doctrine is also expressly held by this court in *Shipley et al.* v. *Cowen*, 1 Otto, 330, 338.

In the case at bar, "the proper course prescribed" by the laws of Congress had "been performed," including the "payment of the price of the land," when the location of the land warrant was made. The location of the warrant was as completely "the payment of the price of the land" as if money had been paid therefor, as is held in *Butterfield* v. *C. P. R. R. Co.*, 31 Cal., 264, 268. This having been done, Egerton "acquired a vested interest in the "premises, of which he could not be subsequently de- "prived."

(16.) When the location of a land warrant is made, and a certificate thereof granted, the authority of the government "for disposing of the land is at an end. *The land is no longer in the market: and the register's subsequent sale of it, though to a person without notice, is not sustainable against the location.*" * * * "The situation of the purchaser between the time of purchase and the issuing of the patent is stated by the United States Court to be as follows: 'Until the patent is issued the purchaser has not the *legal title*, but, *having made his entry of the land, and paid for it, the government can no more dispose of the land to another person than if the patent had been issued.*'" *Astrom* v. *Hammond*, 3 McLean, 109; *Mayer* v. *McCullough*, 1 Smith's (Ind.) R., 211.

(17.) "*Patents by the United States for land which it*

has previously granted, *reserved from sale, or appropriated, are* VOID." *Reichart* v. *Felps*, 6 Wall., 165.

This is so declared in a case *at law*. The same doctrine is held in *Reichart* v. *Felps*, 33 Ill., 437.

VIII. THE PATENT AND LOCATION MUST BE TAKEN TOGETHER.—The location of the warrant and the patent are to be taken together and operate "as one act," making the legal title complete, under the doctrine of relation.

(1.) In the case of *Landes* v. *Brant*, 10 Howard, 348, referred to, this Court, at pages 372, 373, discusses this rule of relation as follows:

An "ultimate perfect title" * * is "a confirmation and sanction by the political power of the imperfect title, and gives it complete legal validity; and to protect purchasers the rule applies, 'that *where there are divers acts concurrent to make a conveyance estate*, or other thing, *the original act shall be preferred; and to this the other acts shall have relation*,' as stated in Viner's Abr. Tit. Relation, 290. The doctrine of relation is well illustrated in *Jackson* v. *Ramsay*, by the Supreme Court of New York, 3 Cowen, 75, and recognized by the Supreme Court of Missouri in the case of *Crozeley* v. *Wallace*, 12 Mo. R., 145."

"Cruise on Real Property, vol. 5, pp. 510, 511, lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.'"

After further remarks, this Court continues:

"Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811, and the patent of 1845, must be taken to relate to the first act: that of filing the claim in 1805. On this assumption, intermediate conveyances made by the confirmee, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to the alienee. And on this ground the deed made by the sheriff to McNair is valid."

(2.) This doctrine is re-affirmed in *Beard* v. *Federy*, 3 Wallace, 491. See also *Teschemacher* v. *Thompson*, 18 Cal., 27. In the latter case, Mr. Ch. J. FIELD says, that "the patent gives precision to the title pre-existing." *Ibid.* And he also declares that the only persons against whom the action of the government is not *conclusive*, "are those "whose title accrued *before* the *duty* of the government" attached, etc. *Ibid.*

(3.) In the case of *Bagnell et al.* v. *Broderick*, 13 Peters 450, 451, this court remarks:

"In 1 Peters, 662, (*Ross* v. *Barland*) it was held that 'the entry and the junior patent could be given in evidence in connection *as one title*, so as to overreach the elder patent. The practice of giving in evidence a special entry *in aid of a patent*, and *dating the legal title from the date of the entry*, is familiar in some States.' * * Yet the entry can only come *in aid of* a *legal title*, and is no evidence of such title standing alone, when opposed to a patent for the same land. Where the title has passed out of the United States by conflicting patents, as it had in the case in 6 Peters, there can be no objection to the practice adopted by the court of Mississippi to give effect to the better right, in any form of remedy the Legislature or Courts of the State may prescribe." 13 Peters, 450–1.

IX. LAST PATENT VOID. FORMER LOCATION AND PATENT CONCLUSIVE ON GOVERNMENT AND ALL CLAIMANTS, EVEN AT LAW.

(1.) "* * *".—Patents by the United States for land which it has *previously granted, or reserved from sale or appropriated are void. Reichart* v. *Felps*, 6 Wallace, 160; *Minnesota* v. *Bachelder*, 1 Id., 115; *U. S.* v. *Stone*, 2 Id., 535–7, *Stoddard et al.* v. *Chambers*, 2 How., 317–18.

(2.) And "this is a question as well examinable *at law* "as in chancery." *Stoddart et al* v. *Chambers*, 2 How., 317.

In the case in 2 Howard, above refered to, at page 318,

this court forcibly enunciates the doctrine for which I contend, as follows:

"No title can be held valid which has been acquired against law." * * "The issuing of a patent is a ministerial act, which must be performed according to law. *A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual.* The fee having been vested in the patentee by the first patent, the second could convey no right. It is true a patent possesses the highest verity. *It cannot be contradicted or explained by parol*, but if it has been fraudulently obtained, *or issued against law*, it is *void*."

Again:

(3.) *When the State has no title* to the thing granted, or the officer has no authority to issue the grant, the acts of such officer are absolutely *void*, and are necessarily examinable at law. *Ludiga* v. *Roland*, 2 Howard, 581; *Wilcox* v. *McConnell*, 13 Peters, 498; *Patterson* v. *Winn*, 11 Wheat., 380; *Polk's Lessees* v. *Wend*, 9 Cranch, 87, 99; *U. S.* v. *Arredondo*, 6 Peters, 691; *Minter* v. *Crommelin*, 18 How., 87; *Boardman* v. *Lessees of Reed et al.*, 6 Peters, 328; *People* v. *Livingston*, 8 Barb., 253; *Jackson* v. *Marsh*, 6 Cowen, 281; *Jackson* v. *Lawton*, 10 John., 23.

(4.) *As against the government and parties claiming under the government* by title subsequent, a patent of the United State issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico, *so long as it remains unvacated, is conclusive*. *Beard* v. *Federy*, 3 Wallace, 478, 492.

In the same case this court holds that—

"A patent is a deed by the United States. As a deed its operation is that of a *quit-claim, or rather a conveyance of such interest as the United States possessed* in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Commissioners. In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed," &c. *Ibid.*, 491.

Grants or cessions of public lands by the sovereign power are grants of only what then belonged to that power. The property of individuals can in no way be affected thereby. *Strother* v. *Lucas*, 12 Peters, 435; *Soulard* v. *U. S.*, 4 *Ibid.*, 511.

(5.) In California it is also held that—

A land patent is conclusive evidence against the Government and claimants under the Government, by title subsequent of the existence, validity, and confirmation of the grant as recited; and it also establishes the title of the patentee from the date of the grant. *Stark* v. *Barrett*, 15 Cal., 361; *Mott* v. *Smith*, *Idem.*, 533; *Teschemacher* v. *Thompson*, 18 Cal., 11, 25.

In the last cited case Mr. Chief Justice FIELD declares the manifestly correct propositions, that subsequent claimants take in subordination to the action of the Government, whether by patent or other claim which has attached; and that they are not entitled to any notice of its proceedings. 18 Cal., 25.

6. It is also held in California that—

"Even in actions *at law*, where there are conflicting patents for the same lands, *the court will go behind the patents to ascertain which party had the prior right.*" *Poppey* v. *Athearn*, 42 Cal., 606, 615; *Smith* v. *Athearn*, 49 Cal., 506.

See also on this subject *Ross* v. *Doe*, 1 Peters, 664.

(7.) In the case of *U. S.* v. *Stone*, (2 Wallace, 535,) to which I have made reference before, this court uses the following language:

"Patents are sometimes issued *unadvisedly or by mistake, where the officer has no authority in law to grant them*, or where another party has a higher equity and should have received the patent. In such cases *courts of law* will pronounce them *void*. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land *reserved from sale by law*, such patent is *void* for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court."

And again:

The survey and patent, under the laws of the United States, are *conclusive* evidence of the title to the land which they embrace, and where there are two confirmations of

the same land, the elder must prevail. *Willot* v. *Sanford*, 19 How., 79.

(8.) A patent is a mere ministerial act, and, if issued for lands reserved from sale, is *void*. *Perry* v. *O'Hanlon*, 11 Mo., 585.

(9.) A new grant of land already granted is a mere nullity. *Nichols* v. *Hubbard*, 5 Richardson, (S. C.,) 267; *Jackson* v. *Lawton*, 10 John., 23.

(10.) Where the United States has no title the grant is void, and is *examinable at law*. *Polk's Lessees* v. *Wendell, et al.*, 9 Cranch, 99.

(11.) "Testimony, whether parol or documentary, which shows *a want of power* in officers who issue a patent, is admissible *in an action at law* to defeat a title set up under it. In such case the patent is not merely voidable, but *absolutely* VOID; and the party is not obliged to resort to a court of equity to have it so declared." *Sherman* v. *Buick*, 3 Otto, 209.

(12.) The doctrine of *estoppel* applies to a State as well as to private persons. So where a State grants lands to a town, having thus parted with all its interests in such lands, it is estopped from claiming afterwards any right thereto. *Vermont Society for Propagation of the Gospel*, 2 Paine C. C., 545, 556-7-8, &c. See also *Commonwealth* v. *Pejepscut Proprietors*, 10 Mass., 145.

In the latter case the Legislature, by resolve, had declared that a certain monument was considered the one mentioned and intended in an ancient deed, under which title was derived to certain proprietors; and it was held that the Commonwealth was estopped from afterwards showing that such monument was not the one intended by the deed.

And so I hold, not only that the Government, and all persons claiming under the Government, are estopped from claiming any right to the land in controversy, after the land warrant location and patent to GILES EGERTON, but also that they are estopped from denying, either by memorandums on the margin of records, or by act of

Congress, what by solemn record of the same Government has been established.

If it is admitted to be true, as claimed in this case, that a mistake was made in issuing to Giles Egerton what purported to be a copy of the grant to him, and if the *mesne* conveyances from Thomas Hart to John Shaw for the *south*-east of 18, together with the entry by Shaw of another tract, under the act of Congress, be considered as evidence properly in the case—even then, *how did the title* of the *north*-east 18, in controversy, *get back into the United States*, so as to enable the Government to convey it, in 1868, to the grantor of the plaintiff in error? How did the United States become *re-invested*, in 1868, with what it had become divested, by warrant location and solemn grant, in 1818? For even if the act of Congress was intended to refer to the *north*-east 18, as the land in lieu of which an entry was authorized, (which it was not,) yet the United States was never re-invested with as much as an equitable interest in that tract; for let it be remembered that there was never any reconveyance to the Government of even the *south*-east quarter, much less of the *north*-east, nor was the entry made under the act of Congress by the "legal assignee" of the *north*-east quarter. Can it be *possible* that any legal mind can be wrought up to *imagine* that a blunder of a government clerk, and the entry by Shaw of a tract of land under the act of Congress, could have the magical effect of transferring the the *title* of the tract in controversy back into the United States, so as to render it liable to sale and another grant in 1868? Can it be *conceived* that a blunder by a clerk, and the gift of a quarter section to Shaw, would effect what all the Departments of the Government combined could not accomplish, except only the judicial in a proper case made? For, unless the Government was re-invested with the *title*, then it had no title to convey, in 1868, and nothing

passed by the junior patent to the stealthy land-shark, who doubtless chuckled while imagining his claws fastened upon the throats of the honest settlers of over 25 years.

(13.) No matter into what shape this question may be turned; no matter even if *equities* could be traced into the Government, and through the Government into the plaintiff in error; yet the stubborn fact stands out, in bold relief, that *by reason of Egerton's warrant and location, the land was not subject to entry and sale in 1868*, and the other stubborn fact, also, that there was an older outstanding patent for the land as shown by the records; either of which facts is sufficient to sustain the rulings and judgment below. The elder outstanding grant of itself was enough to protect the defendants' possession against the plaintiff's claim. *Colston* v. *McVay*, 1 A. K. Marshall, 250; *Thomas* v. *Head*, *Idem*, 450; *Voorhes* v. *Bridgford*, 3 *Id.*, 26; *Price* v. *Evans*, 4 B. Monroe, 386; *Gurno* v. *Jones*, 6 Miss., 330; *Peck* v. *Carmichael*, 9 Yerg., 325; *Love* v. *Gates*, 4 Dev. & Balt., 363; *Connolly* v. *Doe*, 8 Black, 320; *Wolfe* v. *Dowele*, 13 S. & M., 103.

Where there are two legal titles, the elder must prevail in ejectment. . *Stoddard et al.* v. *Chambers*, 2 How., 317.

X. No Presumptions that there were Not Two Soldiers named Giles Egerton in the same company, to whom the two quarters were conveyed.

The grant, as shown by the permanent records of the government, and the land warrant location, must be taken or considered together "as one act," and as constituting "one title," as demonstrated in what precedes, the grant, under the doctrine of relation, giving "precision to the "*title pre-existing*," and the location of the land warrant, "*dating the legal title from the date*" *of such location*. Thus, the evidence is *conclusive* that the land in contro-

versy (the *north*-east 18) *was* granted to Giles Egerton, January 10, 1818. If it be held, considering all the evidence in this case, that the *south*-east quarter of the same section was also patented to a man of the same name of Giles Egerton, then the law is, no evidence appearing that there was *but one Giles Egerton* in the company mentioned in the senior patent, that *it will not be presumed*, by the courts, *that there were not two soldiers of that name* in the army, and in the same company. And the *onus* of showthat there was but *one* Giles Egerton, even in the same company, is on the party asserting the claim that there was but the one.

In the case of *Montag* v. *Linn*, 23 Ill. R., 551, a deed was in controversy containing a double description—one numerical and the other by reference as "being the same "tract of land granted to John Silver by the government "of the United States of America, for military services," etc. The numerical description as originally inserted in the deed was erroneous, and had been altered, as was determined by the court by inspection. It was attempted to avoid this *alteration* by resort to the description afforded by the reference to the grant to Silver, under the established proposition of law that "if there be a mis-descrip-"tion by numbers in a deed, it may be corrected by refer-"ence to the general description as being the same land "granted," etc. The court decided that the grantee could not *alter* the numerical description, and *then* rely upon the general one. In discussing the matter, the learned and distinguished Judge (BREESE), who delivered the opinion of the court, said:

"The argument is, that there being a perfect and unaltered description of the land, following the altered numerical description, makes the alteration immaterial. This seems to be a *petitio principii*—a begging the question, for *it is not admitted that the words* following the numerical description of the land *are, or were designed to*

be a description of the land granted. The land granted was described by certain numbers, and that land thus described was the land, and the only land, granted by the government of the United States to John Silver. In the patent from the government to Silver, the land is described by numbers, *and if it was shown there was but one John Silver in the army, in McIntosh's light artillery, the general description might be sufficient.* In the deed, the grantor conveyed to Cofield a tract of land, by its numbers, describing it as the same land granted to John Silver, etc. Striking out the description of the land by its numbers, then, *the onus is on the party claiming under the deed to show affirmatively there was but one John Silver to whom land was granted by the government for military services,* and then identify that as the land in controversy." (23 Ill., pp. 556, 557.) * * *

" It may be there was *another* John Silver in the army of the United States, entitled to military bounty land. *It was incumbent on the appellant to rebut such a probability* by some evidence, *for such a probability might well arise as applicable to this case by the language of the deed,* if the numerical description be stricken out. Suppose the deed had been offered unaltered as for the south-east 24, could the court, on the trial, reject the numbers as surplusage, and permit a recovery on the reference clause, *without proof of there being no other John Silver? And by what authority would the court strike out of the deed any part of the description, which was not made to appear false?* Retaining the original description in the deed, as we are bound to do, *it plainly appears it was for a different tract of land than the one in controversy.* And the appellant had no right, or the parties under whom he claims, so to alter it as to meet his case. Such an act should not be tolerated for a moment, for if grown into practice by the tolerance of the court, no one can foresee the frauds and villainies which may result from it." *Montag* v. *Linn.*, 23 Ill., 559, 560.

And the court below, having admitted the act of Congress in evidence on behalf of plaintiff below, I may ask, " by what authority " did it " strike out any part of the " description, which was not made to appear false? " The act authorized the entry of another tract " in lieu of the " quarter patented to said Giles, on the 10th day of January,

"1818, *which had been previously patented to James Durney.*" It appeared in evidence, affirmatively, from the patent to Durney, dated Jan'y 7, 1818, that the quarter "previously "patented to" *him* was the *south*-east 18; and it "was *not* "made to appear false," (what for the purposes of this case I have the right to assume to be the fact,) that there were *two* sergeants named Giles Egerton, in Cotton's Company, 26th Reg't, and that the Giles Egerton referred to in the act was made the patentee of the *south*-east 18, on the same day that the *other* Giles Egerton, (mentioned in the senior patent offered in evidence by defendants below,) became the patentee of the *north*-east 18. Retaining, then, both descriptions in the act of Congress, "as we are bound to do," under the state of the proofs in the case, "it plainly appears" that the quarter referred to in the act, in lieu of which an entry was authorized, was "a different tract of "land than the one in controversy." Nor is it at all unreasonable to presume that there were in fact two sergeants in the same company of the same name. If they were relatives, as they probably were, it was very natural that they should have served in the same company; and it was very natural, also, that they should arrange at the Land Office to get adjoining tracts of land. Possibly they were brothers. There is no law against even brothers having the same Christian name. Indeed the writer knows of a family of the peculiar name of Smith, who so rejoiced in the euphonious name of Samuel Smith that *four* members thereof were each named "Samuel." In after years a somewhat natural difficulty presented itself in the way of properly designating the various Samuels in conversation; so they came to be called respectively "Old Sam.," "Big Sam." "Little Sam." and "Black Sam." These *aliases* afforded a satisfactory solution as to the identity of the various members of the quartette, except when their signatures were needed, and then these modern Samuels

would stand out in black and white, each in his own proper numerical glory, as "Samuel Smith, the First," "Samuel Smith, the Second," and so on to the end!

XI. The Double Description.

The deed of Giles Egerton to Thomas Hart, of July 29, 1819, passed the title of the *north*-east 18, (the land in controversy,) into Hart. As we have before seen, the description of the land in the deed was, "the *south*-east quarter of "section 18," &c., "which q'r section was granted to the "said Giles in consideration of his militiary services, as will "appear by a patent obtained from the General Govern-"ment, dated the 10th day of January, A. D. 1818." By reference to the patent mentioned we find that the land thereby "granted to said Giles" was the *north*-east 18. The defendants below also proved that the *south*-east 18 was patented Jan'y 7, 1818, to James Durney, as before stated: thus showing that there was a mistake in the numerical description contained in the deed to Hart, and that the *intention* was to convey the *north*-east quarter, which in legal effect was done by the general description "which quarter section was granted to the said Giles," &c. The probability of the numerical description of the deed being correct is rebutted by proof that the *south*-east quarter had been granted to another, and did *not* belong to said Egerton, but that the *north*-east quarter had been granted and *did* belong to him at the date of his deed. The general description being complete in itself, the intention of the parties will be carried into effect. These suggestions are made on the hypothesis (which has not been established by plaintiff in error) of there having been but the *one* Giles Egerton.

(1.) If the description of land in the conveyance be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars of the description, yet it shall pass by the conveyance,

that the intention of the parties be effected. In other words, if there be a mis-description by numbers in a deed, it may be corrected by reference to a general description therein, and the mis-description will be rejected as surplusage. The law not only *allows* but requires this to be done. *Lyman* v. *Loomis*, 5 N. H., 408; *Worthington* v. *Hilyer*, 4 Mass., 196; *Abbot* v. *Pike*, 33 Maine, 204; *Smith* v. *Marsh*, 6 Cowen, 281; *Blaque* v. *Gold*, 4 Croke's Charles, 447, 473; *Loomis* v. *McNaughton*, 19 J. R., 449; *Loomis* v. *Jackson*, 18 J. R., 81; *Stringer et al.* v. *Young's Lessees et al.*, 3 Peters, 344; *Fenwick* v. *Gill*, 38 Mo., 510; *Dougherty* v. *Purdy*, 18 Ill., 206; *Montag* v. *Linn*, 23 Ill., 557; *Worden* v. *Williams*, 24 Ill., 67, 74; *Melvin* v. *Proprietor, &c.*, 5 Met., 15.

(2.) "*Any description* adopted by a deed, *by which the premises intended to be conveyed may be established and identified, is sufficient:* and it is the settled doctrine, *for the purpose of sustaining a grant, extrinsic evidence may always be used to identify and establish the objects of the call in the deed.* A devise, or grant, will only be declared void for uncertainty, where, after resort to oral proof, it still remains a matter of *mere conjecture* what was intended by the instrument." *Colcord* v. *Alexander*, 67 Ill., 583, and a large number of cases cited: *Law* v. *The People, ex rel.*, 80 Ill., 269.

XII. The Tax Title and Possession thereunder, etc.

The defendants in error and their grantors, before the commencement of this suit, had occupied the entire quarter section in controversy (having the whole thereof under fence and cultivation), for more than 25 years, under a tax title, accrued for non-payment for the taxes for 1839, and paid all the taxes and assessments thereon for the years 1844 to 1868, inclusive.

Now, if the interest of the Federal Government in the land had not been divested, and if the legal title, also, remained in the United States, then I admit that the tract was not liable to taxation, and that the tax title and the rights following therefrom, would therefore fall, because

land owned by the Government is not liable to taxation: but it has been shown in the foregoing discussion, that the United States parted with its interest through the location of the military land-warrant, even if it could be held that the title was not perfected in Egerton by the grant, which it cannot.

(1.) The land was liable to taxation as soon as the warrant was located thereon, and remained so liable, regardless of any question as to the legal title having passed by the grant. The location of the land warrant created at least an inchoate title; and "no principle is better settled "in this country than that an inchoate title to lands is "property." *Delassus* v. *United States*, 9 Peters, 133.

(2.) "All property, personal and real," with certain exceptions, is liable to taxation in Illinois, and was in 1839. R. S. Ill. (1845), 436, § 1. The same provision was in force in 1839.

(3.) "Lands entered or *located* are liable to be taxed "*as well before patent is issued* by the United States *as* "*after*." *Astrom* v. *Hammond*, 3 McLean, 107–10.

In this case the court say:

"All property, by whatever name it may be denominated, is liable to taxation. Until the patent is issued, the purchaser has not the legal title, but, *having made his entry, and paid for it, the government can no more dispose of the land to another person than if the patent had been issued.* The final certificate obtained on payment of the money, is as binding on the government as the patent." * * * "Lands thus purchased descend to the heirs, and do not go to the administrator. They are treated as real estate, and, in some States, *are liable to be sold on execution, before the patent has issued. When a patent issues, it relates back to the entry, and makes good any conveyance the purchaser may have made.*" *Ibid.*, 109–10.

(4.) "Land is taxable generally, from the time paid for, and *before a patent issues*." *Carroll* v. *Safford*, 3 How., 441; *Witherspoon* v. *Duncan*, 4 Wall., 210.

See also *Ry Co.* v. *Prescott*, 16 Wall., 603.

(5.) "Lands purchased of the United States and paid for, though not patented, may be taxed by a State. Property of every description, under the jurisdiction of a State, is subject to taxation. On the exercise of this power, the Federal Government can interpose no restriction." *Carroll* v. *Perry*, 4 McLean, 25.

(6.) "Lands originally public, cease to be public after they have been entered at the land office, and a certificate of entry has been obtained. *Lands so entered are liable to taxation; and if the taxes are not paid, they may be sold like other lands, even though no patent may as yet have issued. The right to tax attaches as well to* DONATION ENTRIES *as to cash entries*; the particular land in either case, when the entry is made and certificate given, being segregated from the mass of public lands, and *becoming private property*." *Witherspoon* v. *Duncan*, 4 Wall., 210.

(7.) The same doctrine is also held by this court, in the case of *Carroll* v. *Safford*, 3 How., 441.

In this case, Mr. Justice McLEAN says:

"When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. *He held for it a final certificate, which could no more be canceled by the United States than a patent.*" * * * "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect, it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as real estate." * * * "The court think that the lands in question were liable to be taxed." (pp. 460, 461.)

(8.) "When the right to the patent is complete, and the equitable title is fully vested in the patentee, without anything more to be paid, or any act to be done going to the foundation of his right," "*lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent.*" *Ry. Co.* v. *Ruseaff*, 16 Wall., 603, 600.

The same doctrine is reaffirmed by this court in the case of the *Ry. Co.* v. *McShane et al.*, 22 Wall., 446, 461.

(9.) The doctrine for which I contend, (namely, that the *North*-east quarter was subject to taxation by the State of Illinois, at any time after Egerton located his land warrant thereon, whether any patent was granted or not,) is not questioned, so far as I have been able to learn, by any court in this country. On the contrary, this doctrine has been held over and over again, not only by this court, as shown in what precedes, but also in a large number of cases decided by the State courts. Among such, we refer to *Gwynne* v. *Neiswanger*, 15 Ohio R., 367–70; *Wallace* v. *Seymour Renick*, 7 Ohio, 176; 30 Cal., 645, 647–8; *Mathews* v. *Rector, et al.*, 24 Ohio St. R., 439, 445; *Gwynne* v. *Neiswanger*, 20 Ohio R., 556; *Trulock et al.*, v. *Taylor, Admr.*, 26 Ark., 54.

(10.) And so, lands entered or *located*, even though patent is not issued, are also "subject to seizure and sale by taxation." *Landes* v. *Brown*, 10 How., 372–3.

(11.) Such being the law, no acts or transactions by individuals could operate in any way to prevent or bar the right of taxation in the State; under which taxation the defendants in error acquired their rights. They are protected against any title or right in any other party under the limitation laws of both seven and twenty years. R. S. of Ill., 1845, 104, § 8; *Idem*, 349, § 7.

"Claim and color of title," under § 8 of the conveyance act referred to, may be a claim of title less than "color." "A title absolutely void in its inception, when held by a "grantee of the purchaser at a void sale, unless charge-"able with fraud, is claim and color of title made in good "faith within the meaning of the statute." *Chickering et al.* v. *Failes et al.*, 26 Ill., 520. See also 17 Ill., 501, and *Cole* v. *Pennoyer*, 14 Ill., 159. "Any instrument indicat-"ing an intention to pass a title to lands, of which a de-"scription is given, from one party to another, gives color

"of title to the lands described." *McCagg* v. *Heacock et al.*, 34 Ill., 478. An unsupported tax deed is "claim and color of title," and payment of taxes and possession under the same for seven years, creates a bar under the statute. *Webster et al.* v. *Webster*, 55 Ill., 325. And the limitation will run in favor of a party having claim and color of title, although he may have actual notice of an adverse claim by record, or otherwise. *Cook* v. *Norton*, 43 Ill., 391.

That a complete bar was established also under the twenty years' rule, as well by the Illinois statute as under the common law, see *Davies* v. *Easley*, 13 Ill., 192; *Turney* v. *Chamberlain*, 15 Ill., 273–4; *Clark* v. *Lyon*, 45 Ill., 388.

The defendants, then, are completely protected in their possession under their tax deed, payment of taxes and possession of over 25 years; but it is claimed by plaintiff in error that these hard earned rights, as well as the land-warrant location, and the solemn recorded grant by the United States government were all impaled by some fancied estoppel *in pais*, for which my clients are no more responsible than they are for the condition of the Hottentots. Thus it is claimed that a few individuals, strangers to the rights of the plaintiffs, and acting in their personal capacities, are potent to accomplish what all the officers, and all the departments of the government combined (the judicial, under certain circumstances, alone excepted) are powerless to do.

Whatever else it might do, *no doctrine of estoppel could remove the land from liability to taxation.* Through this liability the defendants in error, as we have seen, acquired their rights, and are thus shown to be no mere interlopers, but to have substantial equities, as well as legal interests, that ought to be protected by every court of justice against

the prowling land robbers, who stealthily crawl among the public records in search of technical *flaws* through which to grasp for wicked gain.

Respectfully submitted, &c.

S. CORNING JUDD,

Attorney for Defendants in Error.